INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	21
Appendix	22–39

CITATIONS

Cases:

Bay Ridge Operating Co., Inc. v. *Aaron*, 334 U. S. 446, rehearing denied, 335 U. S. 838	10, 18
Beechwood Lumber Co. v. *Tobin*, 199 F. 2d 878	20
Madison Avenue Corporation v. *Asselta*, 331 U. S. 199	10, 12
Mitchell v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. 2d 527	20
Mitchell v. *Feinberg*, 123 F. Supp. 899	20
Mitchell v. *Meyer Feinberg*, No. 23464, argued and submitted on Jan. 18, 1956	19
Mitchell v. *Hartford Steam Boiler Inspection and Insurance Co.*, No. 23739, argued and submitted on Jan. 18, 1956	19
Phillips Co. v. *Walling*, 324 U. S. 490	16
Powell v. *United States Cartridge Co.*, 339 U. S. 497	16
Shure v. *Rubenstein Bros. Jewelry Co.*, 10 WH Cases 657, 21 Labor Cases, Par. 66,899	20
Sikes v. *Williams Lumber Co.*, 123 F. Supp. 853	20
Tobin v. *Aronow*, 96 F. Supp. 279	20
Tobin v. *Ewbank Motor Freight Lines, Inc.*, 11 WH Cases 354, 23 Labor Cases, Par. 67,411	20

385362—56——1

Cases—Continued Page

Tobin v. *Keystone Mfg. Co.*, 10 WH Cases 636, 21 Labor Cases, Par. 66,911 20

Tobin v. *Morristown Poultry Co.*, 10 WH Cases 571, 21 Labor Cases, Par. 66,798 20

Tobin v. *Wenatchee Air Service, Inc.*, 10 WH Cases 680, 21 Labor Cases, Par. 67,019 20

Walling v. *Belo Corp.*, 316 U. S. 624 ..... 2, 7, 9

Walling v. *Harnischfeger Corporation*, 325 U. S. 427 ..... 10, 11

Walling v. *Helmerich & Payne, Inc.*, 323 U. S. 37 .. 10, 12

Walling v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 ..... 9, 10, 11

Statute:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, et seq.):

Sec. 7 (a) 2

Sec. 7 (d) 18, 38

Sec. 7 (e) 3, 7, 8, 10, 12, 13, 14, 15, 16, 18, 19, 20

Sec. 7 (g) 18, 38

Miscellaneous:

88 Cong. Rec., 77th Cong., 2d sess., p. 1708 ff, 1758, 3241, 8653 17

95 Cong. Rec. p. A5476, (1949) 13

A "Belo" Primer for 1950, by William Conant Brewer, Jr., Labor Law Journal, Nov. 1949, p. 94 15

The Federal Wage and Hour Law (1952), by Charles H. Livengood, Jr 15

House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054, 7731, 77th Cong., 2nd sess 17

Interpretative Bulletin on Overtime Compensation, 29 C. F. R., Pt. 778, Sec. 778.18, issued Jan. 1950 14

Senate Bills 2232, 2373, 2884, 77th Cong, 2d sess. 17

Senate Bills Nos. 190, 237, 78th Cong., 1st sess. 17

Smith Bill, H. R. 6790 17

What the 1949 Wage-Hour Act Means (Nov. 1, 1949), issued by Chamber of Commerce 14

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on December 15, 1955.

OPINIONS BELOW

The opinion of the District Court (R. 81–86) is reported at 129 F. Supp. 675. The opinion of the Court of Appeals (App. *infra*, pp. 22–36) is reported at 228 F. 2d 291.

JURISDICTION

The judgment of the Court of Appeals (App. *infra*, pp. 36–37) was entered on December 15, 1955. By order of Mr. Justice Frankfurter,

dated March 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including April 9, 1956, and by his further order dated April 5, 1956, was again extended to and including May 12, 1956 (App. *infra*, pp. 37–38). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the enactment of Section 7 (e) of the Fair Labor Standards Act, which was added by the Amendments of 1949, was intended to expand the application of the *Belo* decision (*Walling* v. *Belo Corp.*, 316 U. S. 624) so as to exempt from the overtime requirements a contract specifying *any* hourly rate however unrelated to payments made for hours actually worked, and to overturn this Court's subsequent decisions which limited the application of *Belo* to contracts specifying a true and actually operative hourly "regular rate" and not simply a fictitious rate.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are as follows:

> SEC. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his

employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act (Section 7). The case was submitted on stipulated facts, the issue being whether under these facts respondent's guaranteed wage contracts meet the conditions for the overtime exemption provided by Section 7 (e), *supra*.

1. Respondent is a Minnesota corporation which is engaged in the manufacture, sale, distribution, installation, and repair of printing presses, related equipment, and parts. It operates throughout the United States with headquarters in St. Paul, Minnesota, and eleven branch offices in various cities and states (R. 9). At each of the branch offices, except the one in Minneapolis, it employs one or more persons known as "erectors." The number of erectors employed at any one time varies, but during the period from August 1, 1950 to September 6, 1953, a total of seventeen erectors worked for the company. Each one was employed under a standard form of contract, a sample of which is attached to the Stipulation of Facts as "Appendix A" (R. 9–10, 14).

The duties of the erectors "necessitated irregular hours of work," and respondent has executed a separate contract with each of them. The terms of each "individual contract," however, are uniform, except that in a few instances the amounts of the weekly guarantee and the corresponding "basic" hourly rate have been different.[1] The terms of the contract state that the employee will be paid at the basic hourly rate for the first 40 hours and at one and one-half times such basic

[1] Most of the contracts (for 11 of the 17 erectors) uniformly provided a weekly guarantee of $66.30 ($132.60 biweekly) with a corresponding "basic" hourly rate of $1.27½, subsequently raised to a $69.42 weekly guarantee ($138.84 biweekly), with a corresponding "basic" hourly rate of $1.33½.

rate for time over 40 hours, provided that he shall receive not less than the weekly guarantee "for regular time and for such overtime as the necessities of the business may demand." The contract includes the further qualification that the weekly guarantee "is subject to adjustments for vacations, absences, and any other conditions not within the control of the company" (R. 14).

While the formal terms of the contracts do not so state, the stipulated facts show that the amount of the "basic" hourly rate is computed from a mathematical formula which assumes that the amount specified as the weekly guarantee is equivalent to pay for a workweek of 48 hours with overtime compensation for eight hours included therein (R. 10–11, 17–80). The 48 hour workweek is used indiscriminately as the basis for computing the hourly rate specified in all the contracts, although it has no relation to the usual range of hours actually worked either by the individual erector or by the group as a whole, and likewise takes no account of the marked differences in the actual working hours of individual erectors (see payroll transcription sheets and the chart summarizing them, attached to the Stipulation of Facts, R. 15, 17–80). These payroll transcriptions sheets, which cover the three year period preceding the filing of the suit, also show that, in fact, most of the erectors rarely worked any overtime at all and were regularly paid the amount of the weekly guarantee for

their normal nonovertime workweek of 40 hours or less. Although on rare occasions some of the erectors worked 48 hours or more, the actual working hours of all of them were usually substantially less. As a whole, the group worked less than 48 hours over 95% of the time and worked no more than 40 hours weekly almost 80% of the time.[2]

On the few occasions when an employee worked more than 48 hours he was paid one and one-half times the "basic" hourly rate for hours in excess of 48, in addition to the weekly guarantee. Some of the employees, however, *never* worked more than 48 hours so that there was never any occasion for consideration of their "basic" hourly rate in determining the wages actually paid. Six of the other employees exceeded the 48 hours in only a single week each during a three year

[2] A chart compiled from respondent's records covering the period from August 1, 1950 to September 6, 1953 summarizes the pertinent statistics on the actual hours of work (see Appendix B to Stipulation of Facts, R. 15). This chart shows that, during the entire period of slightly over three years, only one of the 17 employees had over five weeks in which he worked in excess of 48 hours. The group as a whole exceeded 48 hours in only 2.9% of the time, and worked as much as 48 hours in only an additional 1.4% of the time. Thus, as a whole, they worked less than 48 hours over 95% of the time and worked no more than 40 hours weekly almost 80% of the time. Some of the individual erectors worked no more than 40 hours weekly as much as 90% of the time. And the average workweek for the individual employee ranged from a low of 32.5 hours to a high of 42.60 hours, with an average for the group of 37.86 hours.

period, three others in only two weeks each, one in four weeks, one in five weeks, and the one remaining employee in 16 weeks (R. 15).

2. The Court of Appeals, affirming the District Court, held that respondent's wage plan complied in all respects with the requirements of Section 7 (e), *supra*. Its decision was premised on its view that this section was enacted "in order to give specific legislative sanction to wage arrangements of the 'Belo' type" [referring to this Court's decision in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624], by prescribing "self sufficient," "detailed statutory guides" to replace all of this Court's decisions which had established principles for determining whether the arrangement was a valid bona fide one or an invalid fictitious one. Though expressly recognizing that "the legislative history makes clear that Congress had the Belo decision in mind" when it enacted Section 7 (e), the court stated it could not infer that Congress meant Section 7 (e) "to be merely clarifying language approving the principle of the *Belo* case as elaborated and applied in subsequent court decisions" (App. *infra*, p. 30). It inferred, instead, that Section 7 (e) "enables the courts to make a fresh start" in determining the validity of such wage agreements guided solely by "the unambiguous language" of the new section, "whatever the courts might have held without the statutory

guidance of Section 7 (e)." *Id.* at 31. The court concluded, therefore, that it was unnecessary to look beyond the bare terms of respondent's wage contracts to determine whether the specified hourly rates were actually operative "regular" rates, or merely fictitious rates unrelated to payments regularly made for the employees' actual working hours, but that the "regular rate" requirement of Section 7 (e) was satisfied if the amount of the contract hourly rate is mathematically consistent with the amount of the weekly guarantee specified (App. *infra*, p. 34).

REASONS FOR GRANTING THE WRIT

The decision below represents a drastic departure from the basic principles established by this Court's rulings, prior to the 1949 enactment of Section 7 (e), construing the term "regular rate" on which the overtime requirements of the Fair Labor Standards Act depend. The assumption on which the decision below rested, that Section 7 (e) constituted a sweeping repudiation of those decisions, is wholly untenable; it is not only contrary to the statutory terms used in that section, but is also refuted by the legislative history as well as the common understanding of the meaning and intent of the provision at the time it was enacted. The issue is of large importance in the administration and enforcement of the overtime provisions of the Act, as this Court has recognized in granting certiorari in

numerous previous cases involving similar wage arrangements. The ruling below, if allowed to stand, will encourage the revival of artificial schemes to circumvent the overtime requirements which had been reasonably restrained by the Court's decisions following the *Belo* case,[3] and will thus immeasurably undermine the basic overtime policy of the Act. At present, the issue directly and immediately affects hundreds of employees working under contractual arrange-

[3] *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, upheld a contractual arrangement for employees working irregular hours whereby a "basic" rate of pay per hour was specified for the maximum hours fixed by the Act, time and one-half this "basic" rate was specified for "overtime," and the employee was guaranteed a certain fixed sum each week covering both regular time and overtime. The employee had to work more than 54½ hours before he became entitled to any pay in addition to this weekly guarantee but the additional hours were paid for at time and one-half the contractual "basic" rates. In contrast to the instant case, however, in *Belo* the overtime workweek was characteristic and typical of the employment actualities, the actual working hours being in excess of the statutory 40-hour week over 80% of the time (see record in *Belo*, No. 622, Oct. Term 1941, pp. 194–337) and there were sufficiently frequent occasions when employees earned more than their weekly guarantees (*i. e.* when the contractual basic rate was actually used to determine the weekly amount paid) to warrant the conclusion that the guarantee was not simply compensation "actually paid the employee for the normal non-overtime workweek", but also included compensation for actual overtime work—so that the contractual hourly rate "did in fact set the actual regular rate at which the workers were employed" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*, 325 U. S. at 424, 426).

ments which are now being litigated in other courts, and there are bound to be comparable arrangements all over the country if the broad rule laid down by the First Circuit remains in effect.

"1. The construction of Section 7 (e) by the decision below, without support in either the statutory terms or the legislative history, implies a flat repudiation of a line of important decisions by this Court which established basic and far-reaching principles for the administration and enforcement of the overtime requirements of the Act. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, *Walling* v. *Harnischfeger Corporation*, 325 U. S. 427, *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, *Madison Avenue Corporation* v. *Asselta*, 331 U. S. 199, and *Bay Ridge Operating Co., Inc.* v. *Aaron*, 334 U. S. 446, rehearing denied, 335 U. S. 838. Writs of certiorari were granted in these cases, it seems reasonable to assume, because of the Court's awareness of and concern over the potentialities for abuse of the *Belo*-type contract to circumvent the statutory overtime policy.

This line of decisions made it unmistakably clear that the mere formal specification of an hourly rate in a guaranteed wage plan is insufficient to qualify the rate as a true "regular rate" within the meaning of the overtime provisions of the Act, and that a *Belo*-type contract is valid only "*provided it is not a mere artifice unrelated*

to wage earning actualities" (see concurring opinion of Mr. Justice Frankfurter, *Walling* v. *Harnischfeger Corp., supra,* 325 U. S. at 433, emphasis added).[4] The Court held that the specified hourly rate must bear some significant relation, not merely in the formal contract terms but in actual operation, to the normal payments actually received for actual working hours, in order to qualify as a true "regular rate." If the contractual hourly rate has no significant relation to actual payments, if there is never, or virtually never, any occasion for reliance on the rate in determining the compensation actually paid, then it is merely a device for labelling part of the regular normal nonovertime pay as so-called overtime compensation simply for the purpose of avoiding payment of any real overtime compensation. A contract fixing an hourly rate solely by such a mathematical manipulation plainly does not in fact set an actual "regular rate" at which the worker is employed.

This was made very plain in the case of *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* where the court said (325 U. S. at 426):

The [*Belo*] case is no authority, however,

[4] See also Mr. Justice Frankfurter's references in his dissenting opinion in the *Bay Ridge* case, *supra,* 334 U. S. at 488–489, to agreements which have "mislabeled the true circumstances of the employment relationship" or "misrepresent the regular situation", labeling as "regular" that which is in actual practice "exceptional".

> for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.

Similarly, in *Walling* v. *Helmerich & Payne, Inc.*, *supra*, the wage plan was held invalid because "respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working" (323 U. S. at 41). In another decision a few years later this Court reiterated that a contractual hourly rate, in order to qualify as a "regular rate", must reasonably represent "actual fact" and "the hourly rate actually paid for the normal non-overtime workweek," and added that "in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do" and to "the operation of the plan in actual practice." *Madison Avenue Corp.* v. *Asselta*, 331 U. S. at 204, 209.

Section 7 (e) does not in terms, of course, refer to any of these decisions, but, significantly, it retains the term "regular rate of pay" as the basic standard, and that is the term construed in the *Belo* and in all of the above-cited decisions of this Court. The new section also includes "bona fide," which was a consideration in all of this Court's decisions construing *Belo*-type con-

tracts.[5] Thus, plainly, the statutory terms do not show that Section 7 (e) was intended to repudiate all of this Court's decisions construing the term "regular rate," and to validate a contract which simply labels *any* rate as the regular hourly rate so long as, when multiplied by an equally arbitrary figure (up to 60 hours), it mathematically equals a guaranteed weekly salary. Had Congress intended *any* specified hourly rate to be sufficient, it would have been simple enough merely to require specification of an "hourly rate" instead of a "regular rate".

Nor is there any warrant in the legislative history for the inference that Congress intended to open the door wide to artificial and fictitious *Belo*-type contracts which this Court repeatedly held invalid and carefully distinguished from the agreement upheld in *Belo*. The main sponsor of Section 7 (e) himself described the section simply as giving "specific legislative approval to *Belo*-type contracts (*upheld by the United States Supreme Court*)" (95 Cong. Rec., p. A–5476 (1949), emphasis added.) Clearly, this

[5] There is no justification for the assertion in the opinions below that "There does not seem to be any dispute either as to the fact that the employees are employed pursuant to bona fide individual contracts" (App. *infra*, p. 35), if this means to imply an admission by the Government that the contracts satisfy the "bona fide" conditions of Section 7 (e). The assertion patently begs an important aspect of the very question here in issue, *i. e.* whether an identical form contract, used indiscriminately for the group and wholly unrelated to the actual working situation of any individual employee, is a "bona fide individual" contract.

statement cannot reasonably be construed as approving *Belo*-type contracts which this Court had held *invalid*.

That the section was not so intended was immediately and uniformly recognized by those most concerned with its meaning. Not only was it construed by the Government as simply giving express legislative approval to contracts meeting the standards prescribed by the existing decisions of this Court (*Interpretative Bulletin on Overtime Compensation*, 29 C. F. R., Pt. 778, Sec. 778.18, issued Jan. 1950), but even before the Government's construction was announced employer representatives so construed it. The view uniformly expressed was that the new Section 7 (e) was intended to incorporate and reaffirm the subsequent Supreme Court decisions which limited the application of the *Belo* decision. Within less than a week after the enactment of the 1949 Amendments, the Chamber of Commerce (which can hardly be accused of construing this Act over-expansively) issued a pamphlet, through its Employer-Employee Relations Division, entitled *What the 1949 Wage-Hour Act Means* (November 1, 1949), which, after describing the facts of the *Belo* arrangement, advised employers of the effect of the new Section 7 (e), as follows (at p. 11):

> This type of agreement was legalized under the original Act, but *severely limited by the courts* to situations in which

> the exact conditions noted above were met. *The new law reaffirms these decisions,* as well as the requirements a *Belo* contract must meet, but limits the number of hours per week on which the guaranty may be based to 60. [Emphasis added.] [6]

See also Charles H. Livengood, Jr., *The Federal Wage and Hour Law* (1952), a publication of the American Law Institute's Committee on Continuing Legal Education in collaboration with the American Bar Association, where it is stated (at p. 143):

> As in the *Belo* and *Halliburton* cases, from which Sec. 7 (e) derived, the courts will probably look for a nonfictitious relation between the hourly rate and the weekly guarantee.

Thus, the inference drawn by the decision below, that Congress had a much broader intent to provide "a fresh start * * * whatever the courts might have held without the statutory guidance

[6] Another employer representative, attorney for the Mutual Boiler Insurance Company, also within a few days after the enactment, published the same advice. See *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., Labor Law Journal, November 1949, p. 94. After reviewing at length the court decisions bearing on *Belo*-type contracts, the author concludes (at p. 160):

"In the *Belo* case, the guarantee was exceeded in about twenty per cent of the weeks worked. The court looked upon this as evidence of good faith in the setting of the regular rate, *and it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute.*" [Emphasis added.]

of Section 7 (e)" (App. *infra,* p. 31), plainly does not rest on any tangible manifestation of intent. Had Congress intended to expand the *Belo* decision and to repudiate all of this Court's subsequent decisions, certainly it is reasonable to assume that the legislative discussions would contain some indication of that purpose; such drastic action would not have been taken *sub silentio.*[7] But the only statement of the purpose of Section 7 (e) was Congressman Lucas' statement (*supra,* p. 13) which was limited to *Belo*-type contracts "upheld" by this Court.

In the absence of any tangible evidence of a broader, more drastic intent, the decision below rationalizes its construction by surmising that "it may be that in the economic conditions prevailing in 1949 the Congress did not deem this policy [to spread the work by exacting a premium for overtime] to be so strong and controlling as it might have been in 1938 when the Act was originally passed" (App. *infra,* p. 28). The suggestion, at this late date, that the 40 hour workweek is a policy tied solely to the unemploy-

[7] Certainly, at the very least, the First Circuit's construction is not so "plainly and unmistakably" correct as to warrant such a broad extension of the Section 7 (e) exemption, in the face of the well settled principle that "any" exemption in this Act must be "narrowly construed" and limited to situations "plainly and unmistakably within its terms." *Phillips Co.* v. *Walling,* 324 U. S. 490, 493; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517.

ment conditions prevalent at the time of the original enactment of the Act in 1938, is somewhat surprising in view of the persistent adherence to it as an established basic working standard through all the intervening years, which included the economic conditions of the wartime period when there was a shortage of labor and no unemployment problem. At that time, when some 20 odd bills were introduced in Congress proposing the suspension or restriction of all overtime laws,[8] every responsible official opposed the proposal, and none of the bills was enacted. The blanket suspension provisions of the Smith Bill (H. R. 6790) were rejected by an overwhelming vote when proposed as an amendment to the Second War Powers Bill of 1942 (88 Cong. Rec., 77th Cong., 2d sess., p. 1708 ff., 1758). Two other attempts to attach similar amendments to other legislation were likewise rejected.[9]

Equally untenable is the suggestion in the opinion below that the legislative disapproval of this

[8] House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, and Senate Bills Nos. 2232, 2573 and 2884 of the 77th Cong., 2d sess.; Smith Amendment in the House to S. 2208, 88 Cong. Rec. 1708, and O'Daniel amendments in the Senate to S. 2250 and S. 2748, 77th Cong., 2d sess., 88 Cong. Rec. 3241–3243, 8653; House Bills Nos. 992, 1804 and 2071 and Senate Bills Nos. 190 and 237, 78th Cong., 1st sess.

[9] Senator O'Daniel's proposed amendment to S. 2250 (on mobilization of small business for war production) (88 Cong. Rec., 77th Cong., 2d sess., 3241–43); and Senator O'Daniel's proposed amendment to S. 2748 (to amend the Selective Training and Service Act of 1940) (*id.* at 8653).

Court's decision in *Bay Ridge Operating Co., Inc.* v. *Aaron,* 334 U. S. 446, supports the inference that Congress intended a sweeping repudiation of all of this Court's other decisions construing the overtime requirements of the Act (App. *infra,* pp. 30–31). The so-called "overtime on overtime" principle of the *Bay Ridge* decision was unmistakably overturned by another *separate* section of the 1949 amendments (Section 7 (d), subsections (5), (6) and (7) and Section 7 (g), App. *infra,* p. 39). But, far from evidencing an intent to overturn this Court's other decisions bearing on *Belo*-type contracts, this very explicit reversal of the specific effect of the *Bay Ridge* decision supports the opposite conclusion with respect to those other decisions. For Section 7 (d) is the section specifying, in utmost detail, the payments which shall not be included in the term "regular rate," and specifically provides that, apart from the detailed exceptions, the "regular rate" as used in Section 7 "shall be deemed to include *all remuneration* for employment paid to, or on behalf of, the employee * * *" [Emphasis added]. Section 7 (e), which is a separate section, then proceeds to use the term "regular rate" as one of the conditions necessary to qualify for its particular exemption.

2. The importance of this issue is attested by the numerous previous decisions of this Court construing the term "regular rate" (*supra,* p. 10). The principles of these cases have guided the administration and enforcement of the overtime

provisions of the Act for many years, and have been widely accepted by employers, as is evidenced by the above quoted interpretations of the effect of the new Section 7 (e) (*supra*, pp. 14–15). The rule of the holding below, which rests on the assumption that Congress has now repudiated these decisions, will, if allowed to remain, encourage widespread resort to artificial and fictitious wage contracts which can largely nullify the basic policy of the Act to establish the 40 hour workweek as a national working standard. Such efforts are still being made, and will doubtless receive fresh impetus and vigor from the opinion below. In one pending case alone, which is presently awaiting decision by the Court of Appeals for the Second Circuit, 600 employees are subject to wage arrangements substantially similar to the contractual arrangements involved in the instant case. *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.*, No. 23739, argued and submitted on January 18, 1956. Another case, also pending in the same Court of Appeals, involves the validity of a comparable union contract arrangement affecting the statutory overtime rights of all employees covered by the agreement between the Greater New York Tailors Expressmen's Union and the Clothing Express Drivers and Helpers Union. *Mitchell* v. *Meyer Feinberg*, No. 23464, also argued and submitted on January 18, 1956. The large impact of the issue is clear.

3. Although there is at present no conflict be-

tween the decision below and the decisions of another Court of Appeals,[10] the First Circuit's holding is in conflict with the District Court's decision in *Mitchell* v. *Feinberg, supra,* 123 F. Supp. 899 (E. D. N. Y.), as well as with numerous other district court rulings throughout the country. *Sikes* v. *Williams Lumber Co.,* 123 F. Supp. 853 (E. D. La.); *Tobin* v. *Aronow,* 96 F. Supp. 279 (D. Mont.); and unofficially reported decisions in *Tobin* v. *Morristown Poultry Co.,* 10 WH Cases 571, 21 Labor Cases, Par. 66,798 (E. D. Tenn.); *Tobin* v. *Keystone Mfg. Co.,* 10 WH Cases 636, 21 Labor Cases, Par. 66,911 (W. D. Ark.); *Shure* v. *Rubenstein Bros. Jewelry Co.,* 10 WH Cases 657, 21 Labor Cases, Par. 66,899 (N. D. Ill.); *Tobin* v. *Wenatchee Air Service, Inc.,* 10 WH Cases 680, 21 Labor Cases, Par. 67,019 (E. D. Wash.); *Tobin* v. *Ewbank Motor Freight Lines, Inc.,* 11 WH Cases 354, 23 Labor Cases, Par. 67,411 (W. D. Tenn.).

[10] The decision of the Court of Appeals for the Fifth Circuit in the case of *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. 2d 527, decided March 7, 1956, expresses agreement with the First Circuit's construction of Section 7 (e). However, in a previous decision of the Fifth Circuit that court specifically approved the more limited construction of Section 7 (e). *Beechwood Lumber Co.* v. *Tobin*, 199 F. 2d 878, at 881.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

HARRY A. TUELL,
Attorney,
United States Department of Labor.

MAY 1956.

APPENDIX

No. 4996

MITCHELL, ETC.

v.

BRANDTJEN & KLUGE, INC.

December 15, 1955

Appeal from the U. S. District Court for the District of Massachusetts (129 F. Supp. 675). Affirmed.

Bessie Margolin, Assistant Solicitor, with whom Stuart Rothman, Solicitor, Harry A. Tuell, and Thomas L. Thistle, Regional Attorney, were on brief, for appellant.

David W. Kelley, of Boston, Mass., with whom Peter D. Cole, Badger Pratt, Doyle & Badger, of Boston, Mass., and Felhaber & Larson, of St. Paul, Minn., were on brief, for appellee.

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

MAGRUDER, *Chief Judge*: In this case the Secretary of Labor filed a complaint seeking an injunction against defendant-appellee forbidding the corporation from violating the overtime provisions of § 7 of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1063; 63 Stat. 912. The district court found that the wage payments which defendant had been making to its employees in question, in weeks in which any of them

worked more than 40 hours, had been in pursuance of bona fide individual contracts of employment which in all respects complied with the requirements of § 7 (e) of the Act. Accordingly the court ruled that the evidence did not warrant a finding that the defendant had violated the provisions of § 7, and entered judgment dismissing the complaint, from which judgment the Secretary of Labor has taken the present appeal.

Subsection (e) of § 7 was added to the Act by the amendments of 1949 in order to give specific legislative sanction to wage arrangements of the "*Belo*"-type, which the Supreme Court had theretofore approved, by a sharply divided Court and without the aid of express statutory language, in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624 (1942).

The difficulty which gave rise to the litigation in the *Belo* case was that, in § 7 of the original act as enacted in 1938, there was no statutory definition of what Congress meant by the phrase "the regular rate at which he is employed." Section 7 (a) provided, with exceptions not now relevant, that no employer should employ any of his employees who is engaged in commerce or in the production of goods for commerce, as defined, for a workweek longer than 40 hours, "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

It became firmly established that an employer might be guilty of an overtime violation under § 7, even though the total compensation which an employee of his might have received for a work-

week in excess of 40 hours was equal to or in excess of the minimum hourly rate prescribed in § 6, for 40 hours of work, plus time and one-half such minimum hourly rate for every hour in the workweek in excess of 40 hours. *Overnight Motor Transportation Co., Inc.,* v. *Missel,* 316 U. S. 572, 577–78 (1942). Also, it became established that the contract of employment need not express the agreed compensation in terms of an hourly rate, but might, for example, fix the compensation in terms of a lump sum weekly salary, regardless of the number of hours worked in any particular workweek. In such a case "the regular rate" for a particular week had to be determined by translating the agreed weekly salary into an hourly rate, through the device of dividing the amount of salary paid for the week by the number of hours actually worked in that week; and if the employee worked more than 40 hours in any particular week he was entitled to receive extra compensation for such excess hours, in addition to his weekly salary, in an amount at least equal to one-half the regular hourly rate so determined. See *Overnight Motor Transportation Co., Inc.* v. *Missel, supra,* at 580. As the Supreme Court explained in the *Missel* case, instead of forbidding outright any employment in excess of 40 hours a week, as Congress might constitutionally have done, Congress chose, in general, to discourage such overtime work by making it cost something extra to the employer to work his employees in excess of 40 hours a week.

> By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to

> avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. 316 U. S. at 577–78.

In the *Belo* case, the Supreme Court had before it an employer who, prior to the effective date of the Fair Labor Standards Act, had been paying weekly salaries by way of compensation to employees the length of whose workweeks fluctuated widely from week to week. If the compensation basis had been shifted merely to an hourly rate, the employees, due to the irregular hours of employment, never could count on an assured compensation per week. For the dual purpose of conforming its wage arrangements to the requirements of the Act, and at the same time to assure its employees that their previous weekly salaries would not be reduced, the employer entered into bona fide individual contracts of employment which fixed the employee's basic or regular rate of pay at an hourly rate substantially in excess of the minimum prescribed in § 6, and provided that the employee would receive not less than one and one-half times this basic hourly rate for each hour worked in excess of the maximum workweek stipulated in § 7, with a guaranty to the employee that, regardless of the fluctuations in the length of the workweeks, he would always receive at least an amount equivalent to his prior weekly salary. Under the contracts, because of

the fixed relationship between the stipulated hourly rate and the weekly guaranty, each employee had to work at least 54½ hours a week before his guaranty was exceeded, in which event he would be compensated for the hours worked in excess of 54½ at a rate equal to time and one-half the basic hourly rate; but whether he worked 30 hours or 54½ hours in a particular workweek, the employee was still assured of receiving his guaranteed weekly salary. As indicating that the hourly rate stipulated in the contract was not an artificial or fictitious contrivance, the Court emphasized that whenever an employee received a raise in pay the employer would make a conjoint adjustment both of the employee's basic hourly rate and of his guaranteed weekly salary.

The Supreme Court upheld the foregoing wage arrangement in the Belo case. The basic hourly rate specified in the contract became the lawful "regular rate," and this was still true despite the additional provision of a weekly guaranty. There was such a consistent and reasonable relationship between the stated hourly rate and the guaranteed weekly sum that, in any week in which the employee worked a number of hours in excess of the maximum fixed in § 7 [44 hours originally, now 40] but not enough to exceed the weekly guaranty, the parties might fairly be deemed to have contemplated that the guaranteed weekly sum embraced two factors: (1) A sum equal to 44 hours of employment [now it would be 40] at the basic hourly rate, and (2) the balance, regarded as the equivalent of not less than one and one-half times the basic hourly rate for each hour worked in excess of the statutory maximum. In

any week in which the employee worked in excess of the statutory maximum, but less than 54½ hours, it was true that this assumed overtime component of the guaranteed weekly wage was a sum in excess of that arrived at by applying the formula of time and one-half the stipulated basic hourly rate. However, the Court pointed out: "But the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate." 316 U. S. at 632.

From the start, the Administrator of the Wage and Hour Division has disliked the Belo decision and has sought to whittle it down because, to the extent that it was applicable, an employer might make a wage bargain with his employees which would permit him to work them for hours in excess of the maximum specified in § 7 without having to pay a premium therefor, provided the weekly guaranty is not exceeded. While this is true enough, the answer of the Supreme Court in the *Belo* case was as follows (316 U. S. at 635):

> When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer

> and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not.

Accordingly, the Supreme Court declined to overrule the *Belo* case in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17 (1947), but on the contrary applied it to approve a wage arrangement whereunder the employees had to work more than 84 hours a week in order to exceed their weekly guaranties and thus earn additional compensation at one and one-half times the stipulated regular hourly rate.

When in 1949 the Congress set itself the task of making an extensive revision of the Fair Labor Standards Act, it determined to write into the law a provision giving specific approval to wage arrangements of the Belo type. Whereas the Administrator has regarded it as a basic and overriding policy of the original act to encourage employers to "spread the work" by the device of exacting from them a wage premium for hours worked in excess of the maximum stipulated in § 7, it may be that in the economic conditions prevailing in 1949 the Congress did not deem this policy to be so strong and controlling as it might have been in 1938 when the Act was originally passed. At any rate, it is clear from what the Congress did in 1949 that it thought that there were important counter-considerations of policy

applicable in the cases of employers with wide and unpredictable fluctuations of the workweek. The policy decision was one for the Congress to make, whatever the Administrator, or the courts, might think as to its wisdom. Section 7 (e), which the Congress added in 1949, reads as follows (63 Stat. 914):

> No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Notwithstanding this new § 7 (e) appellant urges that the case at bar is determined by the ruling of this court in *McComb* v. *Roig,* 181 F. 2d 726 (1950). We think this is clearly not so, since the overtime compensation which we held to be due in the *Roig* case was for workweeks *prior* to the effective date of the 1949 amendments, and we pointed out (181 F. 2d at 727) that "Congress has finally, in the 1949 amendments, 63 Stat. 910, supplied more detailed statutory guides in the Belo and related situations, but these amendments

do not control the disposition of the case at bar;" in the *Roig* case we did not consider the provisions of § 7 (e) at all.

Though the present case involves overtime compensation alleged to be due for workweeks as to which the new § 7 (e) is undoubtedly applicable, if we understand appellant's contention we are to decide this case just as though § 7 (e) had not been enacted, which would throw us back into the morass of cases in which the courts, groping in the dark, so to speak, without specific statutory guidance, were struggling with the implications of the Belo doctrine, as enunciated originally in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624 (1942). We think no such burden now rests upon us. Though the legislative history makes clear that the Congress had the Belo decision in mind when it enacted the self-sufficient substantive provisions of new § 7 (e), we cannot infer that the Congress mean § 7 (e) to be merely clarifying language approving the principle of the *Belo* case as elaborated and applied in subsequent court decisions. Upon the contrary, the concluding language in § 7 (e) requires that the contract of employment must provide "a weekly guaranty of pay for not more than sixty hours based on the rates so specified"—which would rule out such a wage agreement as was present in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17 (1947), though the Supreme Court had regarded that wage agreement as being lawful and valid within the principle of the *Belo* case. On the other hand, it is clear that the Congress has disapproved such decisions as *Bay Ridge Operating Co., Inc.* v. *Aaron*, 334 U. S.

446 (1948), for it promptly amended the Act to overturn the ruling in that case, notwithstanding the fact that a majority of the Court had held that the wage agreement there involved was not within the Belo principle and did not save the employer from making additional overtime payments for work in excess of the statutory maximum. See 63 Stat. 446; Sen. Rep. No. 402, 81st Cong., 1st Sess. The substance of this amendment now appears in §§ 7 (d) (5), (6) and (7), and § 7 (g) of the Act. See 63 Stat. 914, 915.

Therefore we think that the new § 7 (e) enables the courts to make a fresh start, and in any case of wage agreements which fall within the unambiguous language of that subsection, the employer must be deemed not to have violated the overtime provisions of § 7 (a), whatever the courts might have held without the statutory guidance of § 7 (e).*

*Though we do not in the present case have to decide the point, it may be that wage agreements in terms like those we dealt with in *McComb* v. *Roig*, 181 F. 2d 726 (1950), would not fall within the saving provisions of § 7 (e). The argument would be that when § 7 (e) requires that a bona fide contract of employment must specify, among other things, "a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a)," it is not enough that the contract of employment may name an hourly rate and label it the "regular rate of pay," where it is obvious that such hourly rate is merely an arbitrary and fictitious figure not really meant by the parties to be the basis upon which the agreed compensation is to be calculated. As we pointed out in the *Roig* case, all the employees there concerned, regardless of the wide differences in the kind of jobs that they severally performed, were listed as working at the same contract hourly rate of 47 cents, though their weekly guaranties varied from $24.41 to $40.00. Since there was an absence of

With the foregoing preliminary observations, we now come to the facts of the present case. They are contained in an agreed stipulation and are not in dispute.

Appellee is a Minnesota corporation engaged in the manufacture, sale, distribution, installation and repair of printing presses, and related equipment. Though it has its headquarters at St. Paul, Minn., it operates eleven branch offices in various cities and states throughout the country, at which branch offices it employs one or more persons known as "erectors." The number of erectors employed at any one time was subject to variation, but during the period from August 1, 1950, to September 6, 1953, appellee employed a total of seventeen erectors at its various branch offices, including the one in Boston, Massachusetts.

Each of these erectors was employed under a standard form of individual contract which specified that the employee's "basic rate of pay" would be a certain amount per hour (in all cases in excess of the minimum stated in § 6) for the

any logically consistent or reasonable relation, either on an individual or on a group basis, between the weekly guaranties and the specified hourly rates, we concluded that the hourly rates of 47 cents mentioned in the contracts were artificial contrivances which did not really set the "regular rate" at which the workers were employed; and that therefore the plan failed "even though it is true that four of the eight workers involved, at times, though not often, took home more than their weekly guaranties." 181 F. 2d at 730. We also pointed out that it is a clear indication that the stated hourly rate is wholly artificial if the employees from time to time receive wage increases in the form of increases in the weekly guaranties while the hourly rate remains unchanged.

first 40 hours of work each week, and provided further that for time employed over 40 hours during each week the employee would receive for such excess hours "not less than one and one-half times such basic rate above mentioned," with a guaranty on the part of the employer that the employee would receive at least a stated minimum sum each week. This sum was designed to be the equivalent of what the employee would receive for 48 hours of work at the stated basic hourly rate for the first 40 hours and one and one-half times such basic rate for the additional eight hours. Thus since the guaranty assured to each employee weekly earnings which would be equivalent to what he would earn at the basic hourly rate, plus statutory overtime, for 48 hours of employment each week, the contracts clearly complied with the concluding requirement of the new § 7 (e) to the effect that the weekly guaranty must be "for not more than sixty hours based on the rates so specified."

The hours worked by the said erectors during a workweek varied widely from week to week and from erector to erector due largely to the irregularity and unpredictability of demand for their services. This variation ranged from a minimum of eight hours a week in one case to a maximum of 75 hours a week in another. More often than not these erectors worked less than 40 hours a week, but in over 20 percent of the total number of workweeks in which these seventeen erectors were employed the hours worked were in excess of 40, and in about 3 percent of the total workweeks the hours worked were in excess of the 48 upon which the guaranty was based; and of course in these

cases where the erector worked more than 48 hours and thus exceeded his guaranty, he received additional compensation for the hours in excess of 48 on the basis of one and one-half times his stated hourly rate. The individual contracts of employment in the present case thus indubitably met another requirement of § 7 (e) of the Act in that the duties of the employees involved necessitated "irregular hours of work."

As bearing on the genuineness of the basic hourly rate stated in the contracts, it is a fact that whenever one of the erectors received an increase in pay a new contract was issued to the employee and signed by him to signify his acceptance, with appropriate changes therein both in the basic hourly rate and in the weekly guaranty so as to maintain the consistent relationship between the hourly rate and the weekly guaranty, the amount of the guaranty being in all cases designed to assure to the employee weekly earnings equivalent to what he would receive for 48 hours of employment at the stated basic hourly rate for the first 40 hours and the statutory overtime thereon for the additional eight hours.

We are in entire agreement with the following paragraphs from the opinion of the district court:

> In this case the wage plan employed by the defendant clearly complies with the provisions of Section 7 (e) in the following respects: the employment contracts specify as a regular rate of pay an hourly sum which in each case is at or above the minimum prescribed by the Act; compensation at not less than one and one-half

> times the hourly rate is provided for all hours worked in excess of forty in any workweek; and a weekly guarantee of pay is also provided for not more than sixty hours based on the rate specified. In this case the guarantee is for forty-eight hours of work.
>
> There does not seem to be any dispute either as to the fact that the employees are employed pursuant to bona fide individual contracts. In any case, I find this to be the fact. I also find from the evidence in the case that the duties of the erectors necessitate irregular hours of work. This fact is apparent from but a cursory examination of the payroll records of the employees. Thus the wage contracts in this case comply in all respects with the express provisions of Section 7 (e), *supra*, and for this reason should be sustained by this Court.

It would, in our opinion, be unwarranted judicial legislation on our part to read into § 7 (e) another requirement which the Congress chose not to put there, namely, that under individual contracts which in all other respects comply with § 7 (e) the employees concerned must, in a certain percentage of workweeks, or in a "substantial" or a "significant" number of workweeks, actually have worked enough hours to exceed their respective guaranties so as to entitle them to extra compensation for such excess hours on the basis of time and one-half the basic hourly rate. This contention by the government was rightly rejected in *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (C. A. 8th, 1953), cert. denied, 346 U. S. 832 (1953). To the same effect see

Mitchell v. *Adams*, 129 F. Supp. 377 (D. C. M. D. Ga. 1955).

Similarly, we think we would not be warranted in reading into § 7 (e) an additional requirement that the weekly guaranty must be based upon an assumed *average* number of hours the employee might be expected to work per week during the performance of a contract of employment of indefinite duration. The only requirement in this respect which the Congress chose to insert in § 7 (e) was that the weekly guaranty must not be for "more than sixty hours based on the rates so specified."

So far as the record discloses, the employees concerned have not complained, but are satisfied with the wage bargains they respectively made, under which they are assured of a stable weekly pay notwithstanding that the nature of their employment is such as to make inevitable a wide and unpredictable fluctuation in the number of hours actually worked per week. In this aspect of the case, the observations of the Supreme Court in the *Belo* case (316 U. S. at 635), which we have quoted earlier in this opinion, are very much in point and have an obvious persuasive force.

The judgment of the District Court is affirmed.

On the same day, December 15, 1955, the following judgment was entered:

Judgment

December 15, 1955

This cause came on to be heard on the record on appeal from the United States District Court

for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

Supreme Court of the United States

No. —, October Term, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED DEPARTMENT OF LABOR

v.

BRANDTJEN & KLUGE, INCORPORATED

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April ninth, 1956, without prejudice to a further extension.

(S) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this ninth day of March 1956.

Supreme Court of the United States

No. —, October Term, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May twelfth, 1956.

(Sgd.) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this fifth day of April 1956.

The provisions of Section 7 (d) and (g) of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910; 29 U. S. C. 201, *et seq.*), are as follows:

> (d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> * * * * *
>
> (5) extra compensation provided by a premium rate paid for certain hours

worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * * * *

(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Subject Index.

Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
Argument	10
Conclusion	19

Table of Authorities Cited.

Cases.

Bay Ridge Operating Co., Inc., v. Aaron, 334 U.S. 446, reh. den., 335 U.S. 838	5, 12, 13
McComb v. Roig, 181 F. (2d) 726	6, 7
Mitchell v. Adams, 129 F. Supp. 377	17
Mitchell v. Ralph Adams d/b/a Macon Shirt Co., 230 F. (2d) 527	15, 17
Mitchell v. Hartford Steam Boiler Inspection & Insurance Co., Docket No. 23,739, dec. July 20, 1956	15, 17
149 Madison Avenue Corp. v. Asselta, 331 U.S. 199	5, 12
Overnight Motor Transportation Co., Inc., v. Missel, 316 U.S. 572	13
Tobin v. Little Rock Packing Co., 202 F. (2d) 234; cert. den. 346 U.S. 832	2, 10, 15
Walling v. A. H. Belo Corp., 316 U.S. 624	2, 5, 6, 10, 11, 12, 14, 15, 16, 18
Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17	5, 6, 12, 15, 16
Walling v. Harnischfeger Corp., 325 U.S. 427	5, 12
Walling v. Helmerich & Payne, Inc., 323 U.S. 37	5, 12
Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419	5, 12

Statutes, Etc.

28 U.S.C. sec. 1254 (1)	1

U.S. Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. sec. 201 et seq.) 2
Sec. 6 3
Sec. 6 (a) 9
Sec. 7 3, 8, 9
Sec. 7 (a) 8, 9
Sec. 7 (d) 9
Sec. 7 (e) 2, 8, 9, 10, 11, 13, 14, 15, 16
Sec. 15 (a) (2) 3

MISCELLANEOUS.

95 Cong. Rec. pp. A 5475, 5476 16
95 Cong. Rec. pp. A 5230-5233 16
95 Cong. Rec. pp. 11000, 11001 16
Interpretative Bulletin No. 4, Wages and Hours Division 16
U.S. Fair Labor Standards Act, House Hearings, 1949, pp. 55, 56 16

Supreme Court of the United States.

October Term, 1956.

No. 86.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

v.

BRANDTJEN & KLUGE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 81-86) is reported at 129 F. Supp. 675. The opinion of the Court of Appeals (App. to petition, pp. 22-36) is reported at 228 F. (2d) 291.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

Questions Presented.

1. Should this Court entertain this petition, which seeks to graft onto section 7(e) of the Fair Labor Standards Act, which was added by the amendments of 1949, an additional requirement or test which has no foundation in decision, statute or industry, and which has been repeatedly repudiated by this Court in decisions beginning with the *Belo* case (*Walling* v. *A. H. Belo Corp.*, 316 U.S. 624)?

2. Should this Court review the findings of fact based on stipulated facts, and the decisions of both lower courts to the effect that the respondent's contracts of employment comply in every respect with the law enunciated in decisions of this Court prior to the enactment of section 7(e) of the Fair Labor Standards Act and also comply in every respect with the provisions of law set forth in the said new section 7(e), where the petitioner admits in his petition, pages 19 and 20, that there is no conflict between the decision of the United States Court of Appeals for the First Circuit in this case and the (then) only other existing decision of another Circuit of the Courts of Appeals, and where this Court has already recently unanimously denied a petition for certiorari on the substantially identical contention in *Tobin* v. *Little Rock Packing Co.*, 202 F. (2d) 234; cert. den. 346 U.S. 832?

Statement of the Case.

This was an action for an injunction by the Secretary of Labor under the provisions of the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. sec. 201 *et seq.*), hereinafter called the Act, against the respondent corporation for alleged violations of overtime payment requirements as set forth in

section 7 and section 15(a)(2) of said Act. The respondent in its answer denies said allegations and maintains that at all times in the past and at the present time it has been acting and is presently acting in full compliance with the provisions of that Act.

The parties have agreed on a stipulation of facts in this case, which includes as exhibits a sample employment contract and summary of the weeks worked by the employees involved and some of the petitioner's records relating to the respondent showing the hours worked by each of the respondent's employees involved in this case (R. 9).

The respondent, a small Minnesota corporation, having a total employment of less than seventy-five employees at the commencement of this action, is engaged in the manufacture, in St. Paul of that state, of printing presses, and maintains branch offices throughout the United States in eleven states and ten cities, including the City of Boston in the Commonwealth of Massachusetts, for the distribution, sale and installation of these printing presses. The respondent is engaged in interstate commerce and during the period complained of employed from eight to seventeen "erectors." The general duties of these erectors consist of installation, service and repair of printing presses in the general area to which they are assigned. The hours worked by said erectors vary from week to week and from erector to erector, due to the irregularity of demand for their services. Each of these erectors was employed under a separate written signed contract. The provisions of the contracts are uniform except that the compensation provided varies as to the basic stated hourly rate and therefore as to the stated guaranties, depending upon the experience, skill, longevity and other qualities of the individual erectors. These contracts specified that the erector was to be paid at a basic hourly rate in all cases in excess of the minimum under section 6 of the Act for the first

forty hours each week, with not less than one and one-half times such rate for each additional hour over forty hours. Moreover, the erector was guaranteed each week a designated weekly amount equivalent to forty-eight hours, with overtime for hours over forty computed therein, that is, forty hours at the regular rate for straight time plus eight hours of overtime at one and one-half times the regular rate. The erectors are paid bi-weekly by means of checks issued by the respondent from its home office. Fourteen of the seventeen erectors, during the period up to September 6, 1953, embraced in the petitioner's bill of complaint, exceeded the maximum guaranteed hours. In every case in which the erector was given an increase in pay, both the hourly rate and the guaranty were raised proportionately and a new contract was issued. When an employee worked in excess of the weekly guaranty, he was compensated at one and one-half times the specified rate for hours in excess of the guaranty on each occasion.

At the outset the respondent submits that it has had some difficulty in determining what the petitioner contends is the violation or violations alleged. The complaint is in general terms. Examination of the Fair Labor Standards Act and its amendments and a study of all the decided cases involving the kind of contract involved in this case reveal no basis in logic, statute or any decision for contending that there is a violation here. On the other hand, even a cursory perusal of the decided cases in which a *Belo*-type plan was invalidated discloses in them violations on the face of the contract, or in the mathematics involved, or a failure to keep records of hours worked, or an alternative arrangement. In the case at bar, as appears from the docket entries (pp. 1, 2, 3, of the Record), proceedings were commenced in Massachusetts, far removed from Minnesota, where the respondent had its factory, practically all its employees, all its offices and records, and its experi-

enced and capable labor counsel. This hardship on the respondent was met by the proposal that the most flagrant violation was in Boston, yet the erector stationed in Boston for the New England area did not appear at the trial nor did any other employee of the respondent's. In the succession of briefs filed in the lower courts in this case the petitioner first took the position that the violation was lack of irregularity in the respondent employees' employment, that there was some hidden control of the hours by the employer. When exhaustive investigation by the petitioner failed to produce anything to prove that irregularity was lacking and when the respondent's briefs disposed of this contention by showing the irregularity inherent in the kind of work performed, this basis for the alleged violation was no longer argued by the petitioner.

Next the petitioner in his lower court briefs attempted to argue that the courts in the cases decided after the *Belo* case (*Walling* v. *A. H. Belo Corp.*, 316 U.S. 624) refused to follow it or apply it; and the petitioner thereupon discussed at great length the cases of *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427; *149 Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199; and *Bay Ridge Operating Co., Inc.*, v. *Aaron*, 334 U.S. 446; stating that they were authorities to sustain the petitioner's contention of a violation by this respondent. It was necessary for the respondent to discuss these cases at great length in its earlier briefs to show that they had no similarity to the situation involved in the *Belo* case. This earlier basis of the petitioner's claim was not even mentioned in the Circuit Court of Appeals except that the cases cited *supra* were relegated to a footnote.

Next the petitioner contended in his earlier briefs that the *Belo* and *Halliburton* cases (*Walling* v. *A. H. Belo*

Corp., 316 U.S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17) were the authority for the proposition that the *Belo* plan was available only when the employees worked beyond the guaranty a substantial number of times. When the respondent in its analysis of the facts in these two cases and its quotation of the actual language in the decisions in these two cases made it apparent to the lower court that factually this contention was not true, this contention of the petitioner likewise did not appear in the Circuit Court of Appeals.

Finally, the petitioner in the lower court seized upon the *Roig* case in the First Circuit (*McComb* v. *Roig*, 181 F. (2d) 726) as authority for the proposition that the test of compliance with the provisions of an acceptable *Belo* plan or with the provisions of the Fair Labor Standards Act was whether the guaranty was exceeded a substantial number of times by the employees. Again, by studying the decision in the *Roig* case and by setting forth the actual facts, and by quoting the language used in the decision, the respondent was able to reveal the misconception of the *Roig* decision urged by the petitioner and to expose the false emphasis placed on certain phrases taken out of context from the decision.

Chief Justice Sweeney's well-reasoned opinion in the District Court (R. 81-87) indicated that he clearly understood and correctly applied the logic of the *Roig* decision. Finally in the Circuit Court the petitioner threw overboard all his contentions and all his citations except the claim that the respondent had violated the Act because not enough of the respondent's employees had exceeded the guaranty enough times, thereby attempting to set up as an absolute prerequisite for compliance with the provisions of the Act a test which has no foundation in industry, statute or decision. The only citation the petitioner used for this administrative yardstick that the petitioner was seeking to

graft on the Act was the *Roig* case. If the purpose in bringing this case in a jurisdiction almost half-way across this continent from the respondent's headquarters was to come into the Court of Appeals where the *Roig* case was decided, the strategy backfired as predicted by the respondent, because within the framework of the facts of the *Roig* case and the principles and tests enunciated in that decision lay the ratification and validation of the respondent's position.

The petitioner, however, could not have been guided by the *Roig* decision in originally bringing this action, because the hard core, the true logical gist of the *Roig* decision, does not support the petitioner's basis for alleging a violation here. At no time did the petitioner make any mention of the fundamental principle or test set up by the *Roig* decision. Instead, the plaintiff attempted to distort a mentioned circumstance in the *Roig* case, and said it was the controlling test enunciated in that decision. In order to show that the petitioner had no foundation for seeking to set up as an absolute prerequisite for compliance with the provisions of the Act the notion that so many employees must exceed the guaranty so many times, it was necessary to go back over the Act, beginning with its original enactment, and consider the decided cases. They showed what the problems involved were, what was intended to be done to correct them, what the courts have decided concerning the Act, and made clear that language attempted to be used by the petitioner to prove his proposition was, when put back in its proper setting, part of a sound decision in each of the cases to be cited hereafter in this brief, including the *Roig* decision, and that all these decisions, without exception, sustained the respondent's contention of full compliance with the Act, and none of them supported the use of the respondent's proposed test of after-the-event pouncing on a business if it did not happen to do x amount of business in y place during z period of time.

Petitioner alleges that respondent is acting in violation of section 7 of the Act. The section reads as follows:

> "SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Petitioner's allegations arise out of the fact that the respondent corporation employs its erectors under employment contracts of the type commonly known as "*Belo*" contracts. This type of contract has statutory approval. To be valid these contracts must meet with certain requirements which are set out in section 7(e) of the Act. Section 7(e) reads as follows:

> "(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

Respondent submits that its employment contracts are in conformity with the provisions of the above section. Each contract specifies that the employee is to receive an hourly rate which in every instance is in excess of the minimum 75 cents per hour prescribed by law on the first forty hours in any workweek, and for time over forty hours each week the employee is to receive for each hour of work not less than one and one-half times such basic hourly rate. In addition, the contracts provide the employee with a guaranteed amount of pay for all hours worked up to and including forty-eight hours of work per week.

Respondent predicates its assertion of conformity with the Act on the provisions of section 7(e). Respondent believes that the main purpose of section 7 is to provide for payment of overtime on all hours worked over the basic number of hours. In addition to this, however, it also stipulates how it shall be paid, that is, at not less than one and one-half times the regular rate. "Regular rate" is understood to include "all remuneration for employment paid to or on behalf of the employee" (section 7(d)), with certain exceptions. It is understood by the respondent that by virtue of section 7(e) an employer may pay an employee at a *specified rate* to be designated as the regular rate called for in section 7(a) provided the employer and the employee agree contractually that the specified rate is to be the regular rate. Respondent realizes that, in order for an employer to avail himself of this exception, (1) there must be a bona-fide contract with the employee; (2) the contract must specify a regular rate of pay not less than the minimum hourly rate called for in section 6(a); (3) the contract must specify compensation at not less than one and one-half times such rate for all hours in excess of forty in any workweek; (4) the duties of the employee must necessitate irregular hours of work; and (5) the contract must provide a guaranty of pay for not more than sixty hours based on

the rates specified. Respondent contends that its contracts meet every specification of section 7(e), and therefore there can be no question of violation of the Act as petitioner alleges.

Argument.

None of the usual reasons for granting a writ of certiorari obtains in this case. There is no dispute on the facts. The decision of the District Court (R. 81-87) tested the contracts in question from all angles, in form, in substance, in actual practice, under the cases decided before the 1949 amendment and under the Fair Labor Standards Act as it now exists, and found full compliance. The decision of the Circuit Court of Appeals approached the problem from a different point of view, examined the new section 7(e) carefully, its wording, its history, scrutinized the operation of the employment contract in the field, and came to the conclusion that no basis for a violation existed.

Here there is no conflict among the various Circuits of the Courts of Appeals, but rather unanimity of interpretation and application.

Here, too, is the same old contention first urged in the *Belo* case, and disposed of by the *Belo* decision of this Court, now resurrected before this Court which only recently unanimously denied certiorari on the same contention in *Tobin* v. *Little Rock Packing Co.*, 202 F. (2d) 234; cert. den. 346 U.S. 832.

1. In this petition for certiorari before the Court the petitioner's sole contention seems to be that the decision below is a "flat repudiation," a "sweeping repudiation," of all the decisions of this Court prior to the 1949 amend-

ments; that the decision below holds that the new section 7(e) was intended by Congress to be "a sweeping repudiation of all this Court's other decisions construing the overtime requirements of the Act" (Petition, p. 18).

The best answer to this distortion of the decision below is the reading of the decision itself (Appendix to Petition). In the decision the *Belo* case is carefully analyzed, the cases decided after it are patiently discussed, the Congressional background of the 1949 amendments to the Act is surveyed, the decisions since the 1949 amendments are cited, and when all the facts and operations of the respondent's employment contracts are tested against these standards, no violation or any basis for suspecting a violation is found to exist.

Respondent contends that its wage plan in the case at bar need only be measured against the statute to determine its validity. It is generally conceded that the section of the Act with which we are concerned is a codification of the *Belo* decision. *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624. Respondent, subsequently to the enactment of the 1949 legislation, entered into employment agreements with the erectors in good faith, and these contracts were established in strict conformity with the provisions of section 7(e) of the Act as amended. The facts in the case at bar are substantially similar to those that were before this Court in the *Belo* case, and therefore are to be measured against the doctrine handed down in that decision as it now appears under section 7(e) of the Act as amended.

In the *Belo* case, decided in 1942, this Court approved an employment agreement almost identical to the case at bar, where the employees received a basic stated hourly rate and a guaranteed weekly wage based on that hourly rate for the statutory maximum, and not less than one and

one-half times that hourly rate for hours beyond the statutory maximum. In the *Belo* case, as in the case at bar, the employees, because of the nature of the work, worked irregular hours. The Administrator of the Wage and Hours Division objected that such an arrangement was "artificial." This Court overruled that contention and held that such an arrangement was the only means available to industry for securing a steady income to employees with irregular hours, and that to follow the formula suggested by the Administrator that the "regular rate" be determined by dividing the weekly guaranty by the number of hours worked each week would not be regular (since the weekly hours varied so much), either in the mathematical sense or in the sense that neither the employer nor the employee would know what it was in advance.

Petitioner's contention (Petition, p. 10) that the decision below is a repudiation of the cases of *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, *149 Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199, and *Bay Ridge Operating Co., Inc.*, v. *Aaron*, 334 U.S. 446, reh. den., 335 U.S. 838, is not borne out by the decision itself. Most of them are not even mentioned in the decision. These cases are wholly dissimilar to the case at bar and also unlike the *Belo* case itself. In all of them the employment contract itself was not like the one in the case at bar, or its actual operation was different.

The *Youngerman-Reynolds* and *Harnischfeger* cases involved piece-rate wage plans; the *Bay Ridge* and *Helmerich & Payne* cases involved split pay plans. *149 Madison Avenue Corp.* v. *Asselta* concerned a formula plan which, in fact, was not followed by the parties.

In 1947, five years after the *Belo* case, this Court, in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, approved a contract identical with those in the *Belo* case

except for the amount of the hourly rates and the fixed guaranty.

Bay Ridge Operating Co., Inc., v. *Aaron*, 334 U.S. 446, it is generally agreed, was the decision which dramatically focussed attention on the overtime problems of the Act and precipitated a movement on the part of Congress to amend and clarify the Act. The result was the inclusion in the Act of section 7(e), which took wage payment contracts outside the scope of the *Missel* doctrine (*Overnight Motor Transportation Co., Inc.*, v. *Missel*, 316 U.S. 572) by stating clearly and concisely the requirements necessary for a valid wage plan in which the employer and employee contract what the "regular rate" shall be.

A mere reading of section 7(e) indicates that the employment contracts in the case at bar comply with that section's requirements.

The contention of the petitioner here seems to be, repeated over and over again, that the mere formal contract terms are not enough to satisfy a valid *Belo*-type contract; that its operation must be considered. With that the respondent does not disagree. For it is in the carrying out, the implementing, of the written employment contracts in the case at bar that the integrity, the honesty, the bona-fide quality of the respondent's wage agreements are verified. Not one single instance is stated in the petitioner's argument where the employment contract was not followed by the respondent during the three years covered by the complaint in this case. It is this fact which distinguishes the case at bar from the cases cited earlier where this Court held the wage plan invalid.

In the case at bar the guaranty is based on the hourly rate stated; the relation between the guaranty and the hourly rate is not "fictitious"; rather it is mathematically accurate in each contract. Each contract is signed by the employee involved. No employee has ever complained. No

instance exists where any of the employees involved was ever paid on any other basis. In every single instance when there was any change in the hourly rate or the guaranty a new contract was signed and the same valid relation maintained between the two figures. In each instance that an employee worked beyond the forty-eight hours upon which the guaranty was based he received the correct amount of additional compensation on the basis of one and one-half times his stated hourly rate.

And this exceeding of the guaranty—although it is neither required by the *Belo* decision nor by the provisions of section 7(e), but desired by the petitioner so that it can see if the stated hourly rate is really being used or is only "fictitious"—fortunately occurred in the case at bar, for fourteen of the seventeen employees involved (or 82% of the employees involved) actually worked beyond the forty-eight hours upon which the guaranty was based, and received the correct additional compensation (R. 11, 12). And this exceeding of the guaranteed hours varied among the employees from one-week instances to a sixteen-week instance (R. 11, 12).

This verification of the stated hourly rate in the type of employment contract used by the respondent qualifies the rate as a true "regular rate" under the test advanced by the petitioner.

Another test proposed by the petitioner, although it is now submerged in footnotes (Petition, p. 9, footnote 3; Petition, p. 15, footnote 6), is that for a valid *Belo*-type contract the guaranty must be exceeded frequently. The fact is that nowhere in the *Belo* decision does it appear that the guaranty was exceeded frequently, but only that, as in the case at bar, when it was exceeded, the employee was paid at the hourly rate for the statutory maximum and at least one and one-half times that rate for each hour over the statutory maximum (316 U.S. at 631-632).

Scattered through the petition are references to and figures on percentages in regard to the workweek of the various respondent's employees, yet now in this Court the petitioner does not seem to set forth his customary standard claim that the guaranty must be based on the usual or actual workweek. The fundamental answer to this contention is that the *Belo*-type employment agreement was approved in the *Belo* and *Halliburton* cases, and now in section 7(e), to cover cases where the employment is necessarily irregular, where the hours worked vary from week to week, where in fact there is no usual workweek. That is the *raison d'etre* for the *Belo*-type employment agreement.

But it is not necessary to substitute forecasts of writers and bulletins of Chambers of Commerce as to what section 7(e) means or how it would be applied, as the petitioner has done. Section 7(e) has already been construed and applied in several decisions.

Tobin v. *Little Rock Packing Co.*, 202 F. (2d) 234, has already been referred to in this brief. It was the latest Court of Appeals decision existing prior to the decision below and the first one decided under the new statute. The facts relating to the *Belo*-type agreement and the operation of it in that case were weaker than in the present case; the guaranty had never been exceeded; the plan was upheld and certiorari was unanimously denied in 346 U.S. 832. Incidentally, the petition in that case carries practically the same contentions and citations that are used in the petition in the case at bar.

The decision in the case at bar in the Circuit Court likewise is available to this Court. It has already been followed in the Court of Appeals for the Fifth Circuit. *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. (2d) 527. It has also been followed in the Court of Appeals for the Second Circuit (*Mitchell* v. *Hartford Steam Boiler Inspec-*

tion & Insurance Co., Docket No. 23,739, decided July 20, 1956).

There is plenty of warrant in the legislative history of section 7(e) for the inference that Congress intended to give specific legislative approval to *Belo*-type contracts, to set forth their requirements, and to make sure that the functioning of such useful employment contracts would not be fouled up by impractical, unrealistic rulings or interpretations of the Administrator of the Wages and Hours Division. There is nothing new in this petition that the petitioner has not been saying since the *Belo* case itself. That the petitioner's long continued position is one of open hostility to all *Belo*-type contracts is a matter of record (see Interpretative Bulletin No. 4, Wages and Hours Division; *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17).

That the petitioner's attitude had not changed as recently as 1949 is plainly shown by the remarks of the Administrator of the Wages and Hours Division before a House Hearing on amendments of 1949 condemning all *Belo*-type contracts as such and advising against their encouragement (U.S. Fair Labor Standards Act, House Hearings, 1949, pp. 55, 56).

The Lesinski bill, first one proposing the 1949 amendment, authorized the Secretary of Labor to issue regulations setting forth conditions under which these contracts could be used and how they were to work. This bill was rejected by Congress for that very reason, based on the history of the attitude of the Department of Labor toward *Belo*-type contracts, and instead no rule-making power was given to the Secretary of Labor as to section 7(e). Instead, Congress set forth in the law the requirements for a *Belo*-type contract. See 95 Cong. Rec. pp. 11000, 11001; 95 Cong. Rec. pp. A5230-5233; 95 Cong. Rec. pp. A5475, 5476.

A recent decision brings the picture up to date. In *Mitchell* v. *Adams*, 129 F. Supp. 377 (M.D. Ga., Macon Div., opinion dated March 3, 1955), the Court said (p. 387):

> "In view of the widespread publicity given to the Supreme Court's decisions in the Belo and Halliburton cases, and in view of the specific contention of the Administrator in those cases to the effect that the number of hours guaranteed bore no relation to the usual work week, if it had been the intention of Congress that the validity of such contracts should depend upon whether or not the hours worked should to a certain extent or with a certain frequency exceed the number of hours guaranteed, it would have been appropriate for Congress to have said so."

Upon appeal the citation for this case is *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. (2d) 527.

2. The importance of the issue in this case, however obscure it may be, as framed by the petitioner, is, as the petitioner says (Petition, p. 18), attested by the numerous previous decisions of this Court construing the term "regular rate." The very fact that these decisions already exist, and that Congress obviously utilized them in drafting the 1949 amendments to the Act, constitutes the clearest proof that the issue is no longer important, is no longer new or unexplored, and is the best argument for denying this petition.

An erector with six or seven states to cover may work eight hours one week, seventy-five the next. How many hours he will work no one can predict. It will depend on how many printing presses are sold in his territory and need to be installed; how many will break down and need

repairing, and this will depend on how much business the owner of the printing press is doing at the time in question.

Hence came *Belo*-type employment contracts. That is why this Court approved them and Congress authorized them. They have a function in American business life. And when a *Belo*-type contract, either in its set-up or in its operation, is "fictitious" or "artificial," the violation will be apparent, as even any novice who has read the various decisions in this field soon discovers.

A contract is a legal agreement. What the petitioner loses sight of and what, fortunately for employers and employees, the courts and Congress realize, is that, in addition to the employment agreement being legal, which this one is, it must be agreed to by employers and employees. The fact that it works is significant, as stated in the *Belo* decision; this is more important to the American economy than some rule-of-thumb test for ease of clerical administration by the Department of Labor.

3. The petitioner (Petition, pp. 19, 20) admits there is no conflict between the decision below and the decisions of other Circuits of the Courts of Appeals.

4. The mention in the petition (p. 5) that "The contract includes the further qualification that the weekly guarantee 'is subject to adjustments for vacations, absences, and any other conditions not within the control of the company' (R. 14)" has not been expanded or argued.

If the petitioner feels that it is a harmful qualification, or in any way violates the Act, the petitioner is misinterpreting it. This sentence in the contract has never been used, and the respondent in open court in the hearing before the United States Court of Appeals for the First Circuit stated, and repeats here, that, if the petitioner wished

this sentence deleted from the respondent's employment contracts, a letter to the respondent from the petitioner, requesting it, would accomplish that result.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

BADGER, PRATT, DOYLE & BADGER,
DAVID W. KELLEY,
PETER D. COLE,
PAUL R. FREDERICK,
53 State Street,
Boston 9, Massachusetts,

FELHABER & LARSON,
E-1407 First National Bank Building,
Saint Paul 1, Minnesota,
Attorneys for Respondent.

INDEX

CITATIONS

Cases:	Page
Bay Ridge Operating Co., Inc. v. *Aaron*, 334 U. S. 446, rehearing denied, 335 U. S. 838	15
McComb v. *Roig*, 181 F. 2d 726	11
Mitchell v. *Feinberg*, 123 F. Supp. 899	2
Mitchell v. *Feinberg*, 13 WH Cases 11	2, 6
Mitchell v. *Hartford Steam Boiler Ins. & Ins. Co.*, 12 WH Cases 930	2, 10, 11, 21–24
149 Madison Ave. Corp. v. *Asselta*, 156 F. 2d 139, affirmed, 331 U. S. 199	2, 4, 11, 18
Tobin v. *Little Rock Packing Co.*, 202 F. 2d 234, certiorari denied, 346 U. S. 832	5, 6
Walling v. *Belo Corp.*, 316 U. S. 624, rehearing denied, 317 U. S. 706	8, 10, 11, 12
Walling v. *Harnischfeger Corp.*, 325 U. S. 427	18, 26
Walling v. *Helmerich & Payne*, 323 U. S. 37	9, 12, 17, 26
Walling v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419	5, 17
Statutes:	
Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201):	
Section 7 (a)	17, 46
Section 7 (b)	24, 46
Section 7 (d)	14, 47
Section 7 (e)	3, 6, 8, 10, 13, 14, 49
Section 7 (f)	21, 22, 49, 50
Section 7 (g)	14, 50
Miscellaneous:	
Annual Report on the Labor Force, 1949 and 1950 (U. S. Bureau of Census)	13
Conference Report (H. Rept. No. 1453) on "Fair Labor Standards Amendments of 1949" (95 Cong. Rec. 14930)	14
Report of Subcommittee on Unemployment Pursuant to S. Con. Res. 26 (1950)	28

Miscellaneous—Continued Page

Senate Concurrent Resolution 26, 95 Cong. Rec. 6774 13

Senate Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st Sess., pp. 117, 180 and 198 10

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 86

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO THE BRIEF FOR RESPONDENT IN OPPOSITION

Since the filing of the petition in this case the Second Circuit has handed down its decisions in *Mitchell* v. *Hartford Steam Boiler Ins. & Ins. Co.,* (not yet officially reported, decided July 20, 1956), and in *Mitchell* v. *Feinberg,* (not yet officially reported, decided July 31, 1956), with Circuit Judge Waterman (who authored the court's opinion in *Hartford*) dissenting in *Feinberg.* (See Pet. 19–20, for references to the district court decisions in these cases).[1] These decisions concur in "the reasoning and conclusion"

[1] The opinions of the Court of Appeals are printed in Appendix A, *infra*, pp. 29–45.

of the First Circuit in the instant case.[2] While this development emphasizes the absence of a conflict among the decisions of the Courts of Appeals, the three decisions together underscore the serious far-reaching effect and immediately current importance

[2] The *Hartford* decision upholds the validity under Section 7 (e) of 600 "individual contract[s]" used in the employment of insurance inspectors working in the Hartford Company's 19 widely scattered branches throughout the country. Although the actual hours required for the job have radically differed from region to region and from inspector to inspector, the weekly guarantee is stipulated to be paid for a workweek of 60 hours indiscriminately for each of the 600 inspectors, thus purporting to cover 20 hours of overtime in each case, despite the fact that most of the inspectors rarely, if ever, have worked anywhere near 20 hours overtime, their hours of work typically fluctuating between 35 and 50 hours per week.

The *Feinberg* decision (reversing the trial court), in reliance simply on the *Hartford* decision, upholds the validity of a collective bargaining agreement with the Greater New York Tailors Expressmen's Union and the Clothing Express Drivers and Helpers Union (which covers an unknown, but obviously large, number of employees), providing a weekly guaranteed wage for a scheduled workweek of 48 hours although employees never worked as many as 48, and although the agreement on its face provided that deductions for "days absent" because of "any reason other than lack of work" should be made on the basis of a daily proportion of the weekly wage rather than on the basis of the stipulated "regular" and "overtime" rates. As pointed out in the dissenting opinion of Circuit Judge Waterman, the *Feinberg* decision is plainly contrary to this Court's decision in *Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199, which "clearly proscribed such arrangements" (App. *infra*, p. 45). The dissenting opinion, however, rejected the *basis* of the trial court's decision (which was grounded on "the cumulative impact" of several factors evidencing the fictitious character of the agreement), and stated that the *sole* significant factor which distinguished the case from *Hartford* was the "days absent" provision in the agreement, frankly recognized by Judge Waterman as having "obvious benefits to employees".

of the issue and therefore confirm the need for review by this Court.

In this Reply Memorandum we shall spell out our grounds for asserting this increased need for review, and also set forth further reasons, evoked by respondent's brief in opposition and the Second Circuit's rulings, for our claim that the decision of the First Circuit below is erroneous and contrary to the mandate of Congress. It is our intention to seek review of the two Second Circuit cases, but since they are so intimately connected with consideration of the correctness and impact of the instant decision it seems appropriate to consider them here. In that way, we shall be enabled to file simpler petitions in the *Hartford* and *Feinberg* cases.

I

1. The Second Circuit decisions demonstrate beyond question that the decision below reduces the "bona fide" and "regular rate" requirements of Section 7 (e) to mere artificial and fictitious formalities, in flat contradiction to this Court's decisions prior to the 1949 Amendments (see Pet. 10–12). Respondent's objection that this view of the decision below is a "distortion" (Br. in Opp., p. 11), not only ignores the specific and unequivocal ruling in the decision itself that Section 7 (e) was "self-sufficient" and relieved the courts of the "burden" of "struggling with the implications" of the judicial decisions prior to the enactment of the 1949 Amendments (Pet. App. 30–31), but is also unmistakably refuted by the man-

ner in which the decision below was applied by the Second Circuit in the *Hartford* and *Feinberg* cases. The dissenting opinion of Judge Waterman in *Feinberg,* while emphasizing the direct conflict between the majority decision and this Court's ruling in *Madison Ave. Corp.* v. *Asselta,* 331 U. S. 199, reaffirms the artificial and formalistic criteria on which the *Hartford* decision (which Judge Waterman authored) rested. Judge Waterman there expressly states that neither *Brandtjen* nor *Hartford* attached any significance to most of the factors on which the trial court had relied—all of which were factors considered by this Court's past decisions to be evidence of an unreal and fictitious rate designed to circumvent the statutory requirements.[3]

The important question thus plainly posed by the decision below, as well as by the Second Circuit decisions, is whether the 1949 Amendments to Section 7 were intended to eliminate the preexisting standards for setting a realistic "regular rate" by agreement, or whether, as we believe, Congress was sufficiently concerned in 1949 with preserving the basic statutory overtime policy that it undertook to codify, and indeed to make somewhat more stringent, the preexisting limitations upon such agreements by providing "specific statutory guidance" to this end. That this

[3] In his dissent, Judge Waterman dismisses as of "no significance" or "of minor significance" all of the evidence which led the district court to find the agreement fictitious, with one exception. The one exception, as Judge Waterman notes, was a provision inserted in the agreement for the benefit of employees to protect them from losing the so-called "overtime" compensation when deductions for absences were made. See *supra,* p. 2, fn. 2.

issue is "an important question of federal law which has not been, but should be settled, by this Court" seems undeniable. The "regular rate of compensation," as this Court stated in its pre-1949 decisions, is the *"keystone"* of the statutory overtime policy and the "proper determination of that rate is therefore of *prime* importance" [emphasis added] (*Walling* v. *Youngerman-Reynolds Hardware Co.*, 325 U. S. 419, 424). In our view, the circuits have nullified that "keystone" by reading an erroneous purpose and intent into the 1949 Amendments. We submit that the supposed Congressional intent on which the courts rest should not be accepted without examination by this Court into the accuracy and soundness of the inferences on which the ruling below is premised (*infra,* pp. 8–13, 24–28) and without full consideration of the text and context, not alone of Section 7 (e), but of the other carefully drafted, integrated amendments to Section 7 which were enacted at the same time (*infra,* pp. 13–24).

2. Since these three decisions present the question in varied factual situations, they afford a particularly appropriate occasion for this Court to settle it. Respondent's inferences from the denial of certiorari in *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (C. A. 8), certiorari denied, 346 U. S. 832 (Br. in Op., pp. 2, 10, 15), are unwarranted, not only because of the substantial differences in the facts and basic reasoning of that case, but also in view of the greatly increased importance the problem has assumed in the three years since the denial of certiorari. At that time, the courts, including the Eighth Circuit, con-

sistently agreed with the view that Section 7 (e) of the 1949 Amendments did not change the requirement that the stipulated "regular rate" in a guaranteed weekly wage contract must be an actual and not a merely fictitious rate, and no serious problem had then developed in the application of Section 7 (e). Now the decisions of the court below and of the Second Circuit have unmistakably adopted an interpretation of Section 7 (e) which discards the basic principles that might have averted the development of a problem and clearly invites an outpouring of artificial and evasive wage agreements.

And while the *Little Rock* decision, as far as could be demonstrated at that time, affected only the few office employees (about six) of the particular employer there involved, the decision below has already been followed as a precedent in two cases which, alone, directly affect hundreds, if not thousands, of employees (600 in the *Hartford* case and an unknown number covered by the general union agreement involved in the *Feinberg* case; see Pet. 19). It is also evident, even from the incomplete information now available on the use of Section 7 (e) contracts generally, that many more thousands of employees, including almost every conceivable type of worker, will be affected, if they have not already been.[4] In

[4] In addition to truck drivers in the New York City garment district and the printing press erectors and the insurance inspectors (involved in these three cases), other court decisions indicate that *Belo*-type contracts are being used for a vast range of employments, including production workers in a textile factory, bank clerks and tellers, building service and maintenance employees,

view of this already widespread use of such plans for all types and varieties of employees who have occasion to work any substantial overtime, it is no exaggera-

publishing employees of a newspaper, shipping clerks and messenger boys, guards and watchmen, a telephone operator and miscellaneous employees in a sugar mill, a cashier, laborers and "chief engineer" in an icehouse, production workers in a shirt factory, miscellaneous lumber mill employees including millwrights, sawyers, a planer operator and a bookkeeper, the employees of a cotton merchandising firm, pumpers in a petroleum company, operating engineers in a leather company, field employees in an oil well cementing business including truck drivers, mechanics, cementers and testers, a nonexecutive planer foreman in a lumber mill and general employees in a wholesale poultry and egg business. These court cases alone (even exclusive of cases involving general collective bargaining agreements like that in *Feinberg*, covering an unknown number of employees) involved at least 2,000 employees.

That the number of employees affected is in fact many thousands more, and may well run into the tens or hundreds of thousands, is indicated by an initial survey of the past year's investigative files of the Department of Labor, which, even though incomplete, already show that *Belo*-type contracts are being used to determine the wages of virtually every type of employee in a wide variety of businesses including: clerical employees of almost every sort in numerous types of businesses, creamery production workers, sausage makers, knitting mill production employees, factory workers in an auto accessory plant, machinists, delivery girls, plant employees in a soft drink factory, factory workers in a paper carton manufacturing plant, road machinery operators, janitors, butchers, cooks, bakers, firemen, cashiers, furniture craters, chauffeurs, countermen, porters, warehousemen, electricians, boiler room operators, lathe operators, timekeepers, storekeepers, scalers, linemen for a telephone exchange, elevator operators, field radio telephone operators, "key production men" in factories, the "engineers," announcers and photographers of a television broadcaster, chemists and assistant chemists, "junior accountants," inside and outside salesmen, dispatchers and loaders of a trucking line, receiving clerks, maids, lumber inspectors, material engineers, service men of a food machinery manufacturer, insurance adjusters, yarndyers and bleachers, grooms for racehorses, pattern makers, foremen in diverse businesses, and laboratory technicians.

tion to say that the construction of Section 7 (e) adopted by the decisions of the First and Second Circuits could operate virtually to nullify the fundamental overtime policy of the Act.

II

Three fundamental suppositions of the First and Second Circuits are that the 1949 Congress (1) regarded this Court's decisions on "regular rate" as of little importance except as a burdensome "morass" of "uncertainty" to be removed; (2) paid no heed to the recognized potentialities for abuse of the *Belo*-type contract; and (3) had no concern with unemployment, the economic factor which is at the base of the overtime policy of the Fair Labor Standards Act. Each of these assumptions is erroneous.

1. The position that Section 7 (e) eliminated this Court's post-*Belo* rulings is, significantly, contrary to the generally accepted understanding of the effect of Section 7 (e) immediately following its enactment. See Pet. 14–16. It is also contrary to the view taken by the lower courts in previous decisions. See Pet. 20.[5] There is likewise nothing in the legislative history to show that Congress had this purpose—a purpose which, as we shall point out more fully (*infra*, pp. 17–21, 24–28), would go far to nullify the basic objective of the Act with respect to overtime.

While Congress obviously undertook in the amendments to Section 7 to resolve many of the controver-

[5] Indeed, the court below adopted its view *sua sponte*, despite the express concession by opposing counsel in the instant case that Section 7 (e) was intended to incorporate the limitations of this Court's decisions subsequent to the *Belo* decision.

sial issues about the meaning of "regular rate," it also seems clear that Congress could not have intended to resolve uncertainty by leaving the determination of "regular rate" to virtually unrestricted agreements between employers and employees. Even the most superficial reading of subsections 7 (d) and (f)—see the discussion, *infra,* pp. 14, 21—reveals a studied effort to specify the respects in which the amendments changed this Court's decisions, and at the same time to preserve the basic concept of these decisions that the "regular rate" must be a realistic and not an artificial one.

While the conclusion that Congress intended to simplify the conditions of such agreements, so as to resolve all uncertainties and thus relieve administrative officials and courts of a burdensome task of enforcement, might appear superficially persuasive and appealing, we submit that Congress must have concluded that this easy solution was not feasible. To achieve certainty, Congress could have either flatly prohibited this type of agreement, as some of the earlier bills did, or it could have authorized agreements specifying *any* rate, without the "bona fide" and "regular rate" limitations. Instead, Congress enacted detailed, and in some instances quite complicated, standards to govern the determination of "regular rate" (see App. B., *infra,* pp. 47–49). Moreover Congress used the very terms "regular rate" and "bona fide" which this Court had employed in establishing principles for determining whether an agreement between employer and employee sets a "regular rate in a bona fide manner". See *Walling* v. *Helmer-*

ich & Payne, 323 U. S. 37, 42, and cases discussed in Pet. 10–13. These are plainly not signs of a purpose to eliminate the significant line of post-*Belo* rulings.

2. Also, the legislative history of the 1949 Amendments shows that Congress was specifically aware of, and keenly concerned about, the potentialities for abuse of the *Belo*-type agreements. Two of the earliest bills unequivocally evidenced this concern by including provisions which would have prohibited such agreements (Section 7 of H. R. 2033, H. R. 3190, and S. 653). While the subsequent bills, which permitted their use, differed in their specification of limitations, the conflicting views did not pose the alternative of *expanding* the *Belo* decision (compare *Hartford,* App. A, *infra,* p. 36). And also, contrary to the statement in *Hartford,* we have discovered no employee representatives who advocated approval, much less expansion, of the *Belo* decision. The representatives of both the A. F. L. and the C. I. O. definitely advocated prohibiting such agreements.[8] And the efforts of the employer groups urging approval of the *Belo* decision were directed simply at *preserving* its existing status rather than expanding it. As noted *supra,* p. 8, this was the generally accepted understanding by employer representatives of the effect of Section 7 (e) at the time of its enactment.

Particularly indicative of the misapprehension of legislative intent and "background," on which the

[8] Senate Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st sess., pp. 117, 180 and 198.

First and Second Circuits rested, is the summary manner in which both courts dismissed the Government's construction of Section 7 (e) as merely reflecting the views of an agency which "[f]rom the start * * * has disliked the *Belo* decision and has sought to whittle it down" (Pet. App. 27; see also same implied criticism in the Second Circuit *Hartford* opinion). This implication that the limitations on the application of *Belo* evolved simply from administrative dislike of the decision, rather than from legitimate reasons founded upon the terms and policies of the Act itself, reveals the courts' mistaken conception of the background against which the 1949 Amendments were enacted. For this suggestion shows that the courts disregarded the prevalent and widely shared view, repeatedly expressed by this Court no less than by the Department of Labor (and indeed specifically recognized by the First and Second Circuits in previous decisions),[7] that it was imperative to restrict the *Belo* precedent to reasonably realistic agreements, if the fundamental purposes of the overtime requirements were not to be frustrated.

It is undisputed (recognized apparently even by the decisions here in question) that the *Belo*-type contract, if given unrestricted range, can completely frustrate the basic overtime policy of the Act. The four dissenting Justices in *Belo* (Justices Reed, Black, Douglas, and Murphy) voiced this danger in no uncertain terms (316 U. S. 635–640), specifically pointing

[7] See *McComb* v. *Roig*, 181 F. 2d 726 (C. A. 1), and *149 Madison Ave. Corp.* v. *Asselta*, 156 F. 2d 139 (C. A. 2), affirmed, 331 U. S. 199.

out that the Court could not mean to be saying that "the employer and employee may *capriciously* select a certain figure, *unrelated to the wages paid,* and say 'That is the regular rate of employment,' " for that would surely serve as a precedent to allow the basic statutory overtime policy to be "frustrated" by a mere "verbal device" (*Id.* at 636, 639). [Emphasis added.]

This potential danger was soon explicitly recognized by the whole Court, which at its first opportunity, in a unanimous decision, made it unmistakably clear that *Belo* was not to be construed as approving an agreement which "made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working" and which computed the regular rate "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Walling* v. *Helmerich & Payne,* 323 U. S. 27, 41–42). And in its several subsequent decisions, the Court emphasized the importance of relating the agreed "regular rate" to "actual fact" and to "the hourly rate actually paid for the normal non-overtime workweek" if the agreement was to be at all consistent with the basic statutory overtime policy (see the decisions discussed in Pet. 10–12).

3. The fact is that unemployment was a problem in 1949, and Congress was concerned about it sufficiently to have taken care not to enact legislation which might aggravate the problem. The Bureau of Census figures show that unemployment in 1949 was substantially above the 1947 and 1948 levels. The average unemployment in 1949 was 62% higher than

the average unemployment in 1947 and 1948. In the early months of 1950 the unemployment situation became even worse, reaching a 9-year high of 4.7 million (*Annual Report on the Labor Force,* 1949 and 1950). These figures aroused widespread concern and were brought to the attention of the Congress which enacted the 1949 Amendments. On May 6, 1949, that Congress agreed to Senate Concurrent Resolution 26 which instructed a subcommittee on unemployment of the Joint Committee on the Economic Report to study "the problem of unemployment trends and their significance in current economic analyses" and "to report to Senate and House of Representatives not later than December 31, 1949, the results of its study and investigation." 95 Cong. Rec. 6774.

III

The First and Second Circuits also assume, erroneously, that Section 7 (e) is "self-sufficient" and "unambiguous", thus highlighting the fact that inadequate attention has been focused upon the text and context of the several pertinent amendments to Section 7. This serious oversight may have misled the courts into assuming that Section 7 (e) is "self-sufficient," and may well explain why, contrary to the generally accepted understanding of the effect of Section 7 (e) at the time of its enactment (see *supra,* p. 8), these courts were diverted into relying primarily, if not exclusively, upon suppositions drawn from a superficial view of the legislative "background." The courts apparently failed to note that this subsection is only one of several interlocking

amendments to Section 7. [The other pertinent amendments to Section 7 are printed in Appendix B, *infra*, p. 46.]

1. Directly pertinent, by its very terms, is the new Section 7 (d), which the Conference Report on the Amendments described as "containing a comprehensive statutory definition of 'regular rate'" (95 Cong. Rec. 14930). This amendment provides that "*As used in this section* the 'regular rate' at which an employee is employed shall be deemed to include *all remuneration* for employment paid to, or on behalf of, the employee" except for certain specifically listed and carefully described payments. [Emphasis added.] That this definition was intended to control the meaning of "regular rate" as used anywhere in Section 7 is confirmed by the fact that references to *sub*sections are expressly so designated (see, for example, the reference to "subsection (a)" in 7 (e) and (f) and the reference to "subsection (d)" in 7 (f) and (g)).

We fully agree, of course, with respondent's contention that its wage plan should "be measured against the statute to determine its validity" (Br. in Opp., p. 11). But although respondent concedes (Br. in Opp., p. 9) that the "regular rate" requirement of Section 7 (e) is understood to refer to the term defined in Section 7 (d), the court below did not measure the "basic rate of pay" specified in respondent's agreements against the provisions of Section 7 (d). Instead, it proceeded on the premise that the terms of Section 7 (e) were "unambiguous" and "self-suffi-

cient," without reference either to prior judicial decisions or to other provisions of the amended Act.

While the opinion below refers to the amendments contained in paragraphs (5), (6) and (7) of Section 7 (d) (to note that these paragraphs overturned this Court's decision in *Bay Ridge Operating Co., Inc.* v. *Aaron*), it does not mention the other paragraphs of Section 7 (d) relating to the computation of "regular rate." Reference to the "specific statutory guidance" provided in these other paragraphs would have shown that Congress there codified, rather than overruled, the realistic limitations imposed by this Court's other decisions upon agreements fixing the "regular rate" on which overtime compensation depends.

The payments which Section 7 (d) permits to be excluded from the computation of "regular rate" are listed in seven numbered paragraphs. As just noted, the court below did not refer to paragraph (2) which is directly pertinent to the issue in this case. That paragraph provides that "regular rate" shall not be deemed to include "payments made for *occasional periods when no work is performed* due to vacation, holiday, illness, *failure of the employer to provide sufficient work,* or other similar cause." [Emphasis added.] The plain implication of this exclusion is that payment made *regularly* rather than occasionally for "periods when no work is performed" due to "failure of the employer to provide sufficient work" *must be included* in the "regular rate."[8]

[8] The intent to preserve a realistic "regular rate" is evident in virtually every provision of Section 7 relating to computation of

Since the definition of "regular rate" in Section 7 (d) controls the meaning of "regular rate" in Section 7 (e), the stipulated contractual "regular rate" *must* include payments made for such nonworking periods unless they are only "occasional." In the instant case, such periods plainly were regular and frequent, not merely "occasional." Some of the individual employees, under the contract terms, received payments invariably for many unworked hours every week over a period of two or three years (R. 15).[9] One employee who never worked over 41½ hours a week except for one week a year, over a three year period, regularly received payments supposedly for 6½ or more unworked hours.[10] The group as a whole

overtime compensation. Each of the exclusions from "regular rate" provided in Section 7 (d) relates to meticulously specified payments of an occasional or special nature, and in most instances is expressly limited to "occasional" or "special" types of payments not "dependent on" or "not made as compensation for" the employee's "normal" or "regular" working hours or for the "production or efficiency" required by his normal employment. See, in particular, Sections 7 (d) (1), (2), (3), (5) and (6). The same intent is evident in the requirements of Section 7 (f) that overtime compensation be made on the basis of "bona fide rates applicable to the same work when performed during non-overtime hours" (Paragraphs (1) and (2)) or on the basis of a "basic rate * * * substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums" (Paragraph (3)).

[9] See wage transcription sheets for employees Carter and Nowicki (R. 17–18, 45–50). See also sheets for employee Prudhomme who never worked as much as 48 hours (not as much as 45 hours) a week for a period of over 2½ years, and thereafter in only 2 weeks of the entire 3 year period (R. 25–30).

[10] See wage transcription sheet for employee Cassaady (R. 39–44).

received such payments in over 95 percent of the workweeks during the three-year period (see Pet. 6).

The reasons why the statute requires such payments to be included in the computation of the "regular rate" seem plain. They are the same reasons which led this Court to hold that a realistic regular rate cannot "be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees" (*Youngerman-Reynolds,* 325 U. S. at 426), and that if "the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours," and did not "allow extra compensation to be paid for true overtime hours," then the rate is "fictitious" and "illusory" (*Helmerich & Payne,* 323 U. S. at 41–42). "The Act clearly contemplates the setting of the regular rate in a bona fide manner" and "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Id.* at 42). A contract rate which is "not in fact the regular rate under any normal circumstances" is "obviously an artificial one, however bona fide it may have been in origin" and would enable the employer "by a mere label * * * to nullify all the purposes for which Section 7 (a) was created" (*Youngerman-Reynolds,* 325 U. S. at 425–426). It is, therefore, necessary to "look beyond that which the parties have purported to do," and to view "the operation of the plan in actual practice," and, specifically, to recognize that "payment of 'overtime' compensation for non-

overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated" (*Madison Avenue Corp.* v. *Asselta,* 331 U. S. at 204, 205, 209).

Section 7 (d) (2), in effect, incorporates the principles of these decisions. By requiring inclusion in the "regular rate" of "all remuneration" paid "for employment", except for the specific exclusions, and restricting the pertinent exclusion to payments "for occasional periods when no work is performed," it recognizes the simple practical fact that an employer who purports to make payments *regularly* for periods in which no work is performed is, in reality, making those payments as "remuneration" for the employees' actual working hours, and that the employees' remuneration is actually at a regular rate somewhat higher than the employer claims it to be. In other words, "these employees do in fact regularly receive the higher rate" and "[t]o compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent," making the basic statutory overtime policy "impossible of achievement" (*Harnischfeger,* 325 U. S. at 430–431). For common intelligence tells us that a practical business man would not actually and persistently pay for 48 hours of work if he is getting an average of only 40 hours, or less, of work from his employees, and rarely, if ever, gets 48 hours or more from any employee.[11] The only conceivable reason for an employer's willingness to agree (or to purport) to pay for 48 hours, in such circumstances, must be

[11] This is the fact in the instant case. See Pet. 6.

that, in reality, the amount he pays is what he feels he would have to pay, anyway, for the lesser number of hours (what, in fact, he does regularly and normally pay for the lesser number of hours). If the employer can, within the legal requirements, set his agreed hourly rate low enough so that the total weekly guarantee would not have to be greater than the weekly wage he would have to pay anyway for the lesser number of hours, he has nothing to lose and a great deal to gain at any time he happens to require an abnormal amount of overtime work.

To illustrate, an employer who would ordinarily pay a regular straight time rate of $2 an hour, and who expects that his employees will rarely work much more than 42 hours a week, will be willing to guarantee a weekly wage equivalent to the pay an employee would earn for 42 hours—$80 for 40 hours straight time ($2 per hour×40) plus $6 for 2 hours of overtime ($3 per hour×2), a total of $86. By guaranteeing $86 for a maximum workweek of *48* hours, and specifying the much lower basic rate of $1.62, instead of $2, the employer can avoid entirely *any* increased cost whenever he finds occasion for work in excess of 42 hours up to 6 hours weekly per employee; *i. e.,* he pays *nothing* for these 6 hours of overtime, not even straight-time pay, instead of the $3 per hour he would have to pay at his actual $2 per hour regular rate. Furthermore, he greatly reduces the cost of any overtime in excess of 48 hours whenever he finds an occasion to require that much overtime, for then he pays on the basis of the lower $1.65 basic rate rather than on the real $2 regular rate;

i. e., he pays $2.48 instead of $3 per hour for such additional overtime. The contract has a built-in device for avoiding any additional cost for 6 hours of overtime per week per employee at anytime in the future that the employer may decide to utilize it; in addition, this device enables the employer to decrease his overtime costs for an unlimited number of hours.[12]

This is plainly what the employer in the instant case has done, and this, we submit, is what Section 7 (d) (2) was designed to prevent. The particular administrative criterion, which the First and Second Circuits have rejected, and which respondent characterizes as a meaningless "rule of thumb"—the criterion that a stipulated rate is not a true "regular rate" if set at a figure so unrelated to the employee's actual working hours that his earnings only on rare occasions exceed the guarantee—is a practical adaptation of the requirements of this subsection to Section 7 (e) agreements. For if the employee's earnings

[12] It might be asked why the employee would agree to the prospect of working that much overtime without pay, if he did not feel he was, in fact, being paid for that number of hours. The answer is that, as a practical matter, an employee, when first presented with such a plan, considers what his actual hours of work have been over a period of time, and feels secure in the knowledge that he is not going to be called upon actually to work more than 42 hours in the normal course of his employment, and that the rare occasions when he may work more will be offset by the weeks when he works less than 40 hours—that, therefore, he is not losing anything by accepting such a plan. What the individual employee does not see—and this is a factor of prime importance to the basic overtime policy of the Act—is that, should business conditions change or should the employer decide to cut the number of his employees, the employee in all probability would be called upon *frequently*, instead of only on rare occasions, to work the 48 hours or more.

cannot exceed the weekly guarantee with a reasonable degree of frequency, and his actual average workweek does not even approximate his guaranteed hours, the guaranteed hours must have been set at a figure so high that he will certainly be receiving payments for regular or frequent periods "when no work is performed," and to an extent plainly unjustified by the objective of Section 7 (e) to permit the balancing of short and long workweek fluctuations in order to secure a stable weekly wage (see *infra*, pp. 24–27). If the employee rarely or never exceeds the guaranteed number of hours and his actual average weekly hours do not reasonably approach the guaranteed hours, payments purportedly for "periods when no work is performed" will not be "occasional" within the meaning of Section 7 (d) (2). In these circumstances, the stipulated "regular rate" does not include "all remuneration for [his] employment" within the requirements of Section 7 (d). And Congress, by incorporating the "bona fide" and "regular rate" requirements in Section 7 (e), evidently recognized that the exclusion of such regularly paid remuneration is unnecessary to the attainment of the objective of Section 7 (e).

2. By a process of reasoning similar to that of the First Circuit below, the Second Circuit's *Hartford* decision alluded to Section 7 (f) (3) to draw the inference that the precise limitation in that section negatived any intent to include any "similar" limitations in Section 7 (e). But, like the decision in the instant case, it failed to note the more pertinent provisions of Section 7 (d) relating to "regular rate,"

which would support precisely the opposite inference from Section 7 (f) (3).

In contrast to the "regular rate" language of Section 7 (e), Section 7 (f) (3) (see App. B, *infra*, p. 50) permits the employer and employee to agree, under specified conditions, upon a "basic rate." Significantly, this is the only place in the Act where the term "basic rate" appears, the term "regular rate" being used everywhere else to designate the rate on which overtime compensation is to be computed. This fact shows that Congress was making a deliberate distinction between agreements for a "basic rate" and agreements for a "regular rate." In Section 7 (f) (3), it specified the conditions which must be met by agreements upon a "basic rate," and also included the safeguard that such agreements could be made only pursuant to administrative regulation. It follows, therefore, that Section 7 (e), which expressly requires stipulation of a "regular rate," cannot be used by an employer who wishes to establish a "basic rate" which is not a "regular rate."[13] But plainly it does *not* follow, as the Second Circuit reasons in the *Hartford* case, that Section 7 (e) is self-sufficient and that "limitations not expressly stated [within that subsection itself], were not intended" (*Hartford*, App. A, *infra*, p. 36).

It does not follow, as the Second Circuit further inferred, that any limitation "similar" to those ex-

[13] Respondent's contracts in this case, in terms, specify a "basic rate of pay" (R. 14). Respondent, however, does not purport to have proceeded under Section 7 (f) (3), but is relying upon Section 7 (e).

pressly prescribed for the computation of a "basic rate" could not have been intended to limit agreements for a "regular rate" under Section 7 (e). For it is evident that both of these subsections, like most of the other amendments to Section 7, were directed to the same objective, *i. e.*, allowing some flexibility in computing the rate on which overtime compensation must be paid, subject however to specific limitations designed to keep such agreements reasonably consistent with the basic statutory overtime policy. The conditions applicable to determining "regular rate" were prescribed in Section 7 (d), so that there was no occasion for Congress to include expressly within Section 7 (e) itself the specific limitations on "regular rate." There is certainly no reason to infer that Congress intended to omit from its comprehensive definition of "regular rate" all limitations that might be "similar" to those expressed in the subsection on "basic rate." On the contrary, the most reasonable construction of both subsections is that the limitations on "basic rate" were intended to make the agreed "basic rate" substantially equivalent to a "regular rate" as defined in Section 7 (d). Thus, the inconsistency which the *Hartford* decision sees in applying to Section 7 (e) agreements a criterion "similar" to the limitations expressed in Section 7 (f) (3) rests on a misapprehension of the purpose of that particular limitation. The detailed specification, in Section 7 (d), of what should be included and what should be excluded in determining "regular rate" demonstrates that Congress did not intend that agreements

under Section 7 (e) should be free of similar limitations designed to preserve the basic overtime policy.

IV

The First and Second Circuit decisions would undermine the basic statutory overtime policy to a degree plainly unnecessary for the attainment of the "countervailing" objectives for which Section 7 (e) was designed.

Contrary to the assumption of these decisions, the administrative criterion (*supra,* p. 20; *infra,* p. 26) is not "a rigid application of the 'regular rate' requirement" which would "make impossible the attainment" of "the security of a regular weekly income" [14]—it is *not* the method of computation which

[14] Because *Belo*-type (Section 7 (e)) agreements are sometimes loosely referred to as "guaranteed wage contracts" (*Hartford, infra,* App. A, pp. 30, 32, 34), they are often confused with the *guaranteed annual* wage agreements which assure employees a quite different and far more effective guaranty of stability of income. (Compare Section 7 (b) (2), which, under carefully defined conditions, excepts from the statutory overtime requirements certain collective bargaining agreements designed to provide something of the stability of a guaranteed annual wage.) Unlike the guaranteed wage of a collective bargaining agreement which binds both employer and employee for a definite period of time of substantial duration, the *Belo* or *Brandtjen*-type agreement is a "contract" or "guarantee" in only a very limited and tenuous sense, revocable and subject to change at any time. The Brandtjen & Kluge "contract," for example, is little more than a form letter offering to pay the weekly guarantee for any week the employee commences work when the offer has not yet been retracted. The employee, however, is given no contract for any definite period, nor any assurance that the employer may not change the terms of the "guarantee" offered under the agreement. Indeed, the so-called "contracts" between Brandtjen & Kluge and its employees expressly provide that the weekly guarantee is subject to adjust-

the *Belo* decision described as "inflexible" (*viz*, that the "regular rate," where hours fluctuate from week to week, must be a variable one computed by dividing the weekly wage by the actual number of hours worked *each* week). Apparently, the courts assume that *unrestricted* flexibility is necessary to attain the objective of a stable weekly income and that therefore Congress must have intended unrestricted flexibility. But the employer and employee need not be granted freedom to select capriciously a figure unrelated to the usual fluctuations required by the nature of the work, in order to agree upon a stable weekly wage, and Congress in Section 7 (d) recognized this. Therefore, while allowing enough flexibility to enable agreements for a stable income, it imposed limitations designed to prevent abuse of this flexibility for purposes other than the attainment of the legitimate objective,

---

ments for a variety of reasons, including the very broad one for "any other conditions not within the control of the company," which could, of course, simply mean as and if the employer's business conditions change. And the *Hartford* "contracts" expressly provide that the agreement is terminable by giving two weeks notice.

This distinction between a guaranteed annual wage contract and the Section 7 (e) agreement is of prime importance, because it emphasizes the limited nature of the wage stability which Congress sought to obtain by the enactment of Section 7 (e). While Congress, in enacting Section 7 (e), concluded that this much stability was a meritorious objective, the limited nature of the stability available through such an agreement is plainly a significant factor in deciding the extent to which Congress felt it necessary and intended to sacrifice the basic statutory overtime policy.

The effect of the First and Second Circuit decisions is to extend even more flexibility for agreements under Section 7 (e) than Congress authorized for guaranteed annual wage collective bargaining agreements under Section 7 (b) (2).

i. e., for the purpose of avoiding payment of any "real overtime wages * * * thus negativing any possible effect such a payment might have had upon the spreading of employment" (cf. *Helmerich* decision, 323 U. S. at 40).

The criterion which the Department of Labor has applied, in accordance with the degree of flexibility and the limitations provided in Sections 7 (d) and (e), simply requires that the specified regular rate bear a reasonable relationship to the remuneration regularly paid for the employee's actual working hours. It "does not preclude a wage agreement whereby" the weekly guaranty is "related, *fairly, and not evasively,* partly to regular hours of work and partly to overtime" (cf. concurring opinion of Mr. Justice Frankfurter in *Harnischfeger,* 325 U. S. at 433, emphasis added). It is plainly neither impossible nor impracticable for an employer, on the basis of the fluctuations in the working hours required by the usual course of his business during a reasonable past period, to set the maximum guaranteed hours at a realistic figure instead of purporting to pay for many hours which his experience has shown will rarely, if ever, actually be required by the needs of the business.

An arrangement which has little, if any, relationship to the fluctuations in working hours required in the usual course of the employer's business contains the seeds for encouraging unnecessary abuse of Section 7 (e) agreements, and for spreading *un*employment rather than employment. For no effective "financial pressure" will be applied at the times it is

needed (times of recession) to discourage the employer from discharging some of his men and increasing the overtime of the rest of them.

The overtime policy of the Fair Labor Standards Act was intended to promote a continuous remedial or ameliorative effect on problems of unemployment. It is evident that a widespread use of *Brandtjen*-type (or *Hartford-Feinberg*-type) wage agreements will not only negate this remedial effect, but will actually operate to aggravate the problem of localized "chronic" excessive unemployment, which even exists today, and was certainly a problem in 1949 when Congress enacted the amendments to this Act (see *supra,* p. 12–13).[15] When jobs become scarce in one region, workers migrate to more prosperous regions. If the prosperous regions are replete with *Brandtjen*-type wage plans, employers who have instituted such plans will be reluctant to furnish new jobs to the migrants even if their business has increased. For respondent, and similarly situated employers, far from being deterred by the "financial pressure" of *extra* premium costs, can increase the hours of their existing staff with virtually no additional cost. Thus, the existence of *Brandtjen*-type wage plans may frustrate a most important condition on which "the only real remedy for regional or 'spot' unemployment,"

[15] Although no present national problem of unemployment exists, there are a few local regions which may have been suffering from what President Eisenhower calls "chronic unemployment" due to such factors as the migration of industry, and the development of automation. In order to prevent these minor problems from developing into a major one, the Administration and Congress have begun to take preventive action.

depends—*i. e.*, "a dynamic expanding national economy which will * * * provide attractive job opportunities outside the distressed areas * * *."[16]

CONCLUSION

For these reasons, and for those set forth in the petition, we respectfully submit that the petition should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
IRVING J. ALTER,
Attorney,
Department of Labor.

SEPTEMBER 1956.

---

[16] Report of the Subcommittee on Unemployment of the Joint Committee on the Economic Report, p. 1 (1950).

Appendix A

United States Court of Appeals for the Second Circuit

No. 168—October Term, 1955

(Argued January 18, 1956. Decided July 20, 1956)

Docket No. 23739

James P. Mitchell, Secretary of Labor, plaintiff-appellant

v.

The Hartford Steam Boiler Inspection and Insurance Company, defendant-appellee

---

Before: Medina, Hincks and Waterman, *Circuit Judges.*

Appeal by the Secretary of Labor from a judgment of the United States District Court for the District of Connecticut, Smith, J., dismissing his complaint against the Hartford Steam Boiler and Insurance Co. Affirmed.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., Thomas L. Thistle, Regional Attorney, *for plaintiff-appellant.*

Lucius F. Robinson, Jr., John M. Donahue, Hartford, Conn. (Robinson, Robinson & Cole, Hartford, Conn., of counsel), *for defendant-appellee.*

Cyril Coleman, C. Duane Blinn, Hartford, Conn., *attorneys for Aetna Life Insurance Company, amicus curiae.*

WATERMAN, *Circuit Judge:*

This action, involving the validity under § 7 (e) of the Fair Labor Standards Act, 29 U. S. C. (1952 ed.) § 207 (e), of guaranteed wage contracts of the so-called *Belo* type, was brought by the Secretary of Labor to enjoin the Hartford Steam Boiler Inspection and Insurance Co. (hereafter "Hartford") from violating the overtime provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* The United States District Court for the District of Connecticut dismissed the Secretary's complaint on the ground that defendant's guaranteed wage contracts were not in violation of § 7 (e) of the Act, and the Secretary appeals.

Hartford is a Connecticut corporation engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. It employs approximately 600 inspectors, whose duty it is to determine the initial and continuing suitability of boilers, machinery, etc. for insurance. The duties of these inspectors necessitate irregular hours of work, typically fluctuating between 35 and 50 hours per week. Since 1950 Hartford has paid its inspectors under individual guaranteed wage contracts providing for an hourly rate of pay for the first 40 hours in each work week, time and one-half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked. Each inspector was notified by a form letter accompanying his contract that it was not contemplated that he would have to work more than 60 hours in any work week, and each employee was required to get company authorization before doing so. In actual practice, only one quarter of 1% of the work

weeks over a two-year period exceeded 60 hours. The District Court found that the hours worked "were expected to fluctuate but to be kept below 60 hours in all but the most exceptional cases."

The sole issue raised by this appeal is whether a guaranteed wage contract complies with § 7 (e) of the Act, 29 U. S. C. § 207 (e), even though the employees subject to that contract do not work a number of hours in excess of the guarantee period specified in the contract in a "substantial proportion" or "significant number" of work weeks.[1] The Secretary, relying primarily on the judicial interpretation of "regular rate" prior to 1949, when the Act was extensively revised and § 7 (e) added, contends that the phrase "regular rate of pay" in § 7 (e) impliedly incorporates the "substantial proportion" requirement; Hartford disagrees. To resolve the issue, we must refer to the words of the statute, its purpose and history, and the cases construing it.

The basic overtime pay requirement of the Act is contained in § 7 (a).[2] It expresses the employer's

[1] The Secretary does not question the bona fides of the contract, the irregularity of the hours worked by the inspectors, and the sufficiency or accuracy of the records kept by Hartford. Hartford, however, contends that its inspectors are exempt from the coverage of the Act as administrative employees under § 13 (a), 29 U. S. C. § 213 (a). The Secretary replies that that question cannot be raised here because no cross-appeal was taken. Because of the view we take as to the validity of Hartford's guaranteed wage contracts, it is unnecessary for us to decide either the merits of this question or whether the issue can properly be raised by Hartford without a cross-appeal.

[2] "SEC. 7(a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

obligation in terms of a duty to pay for overtime not less than one and one-half times "the regular rate at which he is employed." The term "regular rate" was not defined in the original Act, nor was any reference made to guaranteed wage contracts. This absence of precise statutory criteria necessarily left to the courts the problem of giving content to the statutory language and of defining the limits within which employers and employees might establish basic and overtime rates by contract. The Department of Labor, which has consistently opposed guaranteed wage plans, initially took the position that any wage plan which did not reflect the actual hours worked in each workweek was invalid. However, this position was rejected by the Supreme Court in *Walling* v. *A. H. Belo Corporation,* 1942, 316 U. S. 624, and guaranteed wage contracts of the type now sanctioned by § 7 (e) were held valid. *Walling* v. *Belo Corporation, supra; Walling* v. *Halliburton Oil Well Cementing Co.,* 1947, 331 U. S. 17. Other Supreme Court cases, while accepting *Belo* as an exception to the usual rule, tended to narrow its application. *Walling* v. *Helmerich & Payne,* 1944, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 1945, 325 U. S. 419; *Walling* v. *Harnischfeger Corporation,* 1945, 325 U. S. 427; *149 Madison Ave. Corporation* v. *Asselta,* 1947, 331 U. S. 199; *Bay Ridge Operating Co.* v. *Aaron,* 1948, 334 U. S. 446. The Courts of Appeals, confronted by an exception of uncertain scope, evolved different criteria with the result that each case turned "pretty much on its particular facts." *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726, 727; cf. *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

It was against this background of uncertainty that Congress, as part of an extensive revision of the Act of 1949, enacted the present § 7 (e).[3] Section 7 (e) represents a codification of the previous case law only to the extent that it constitutes an express recognition of the validity of guaranteed wage contracts, limited in their use to employees who must work irregular hours and subject to the requirement that the contract be a "bona fide individual contract" or "an agreement made as a result of collective bargaining." The only express limitation on the contract guarantee of pay is that it be "for not more than sixty hours." There is no requirement expressed in the section that there be any sort of relation between that guarantee and the number of hours actually worked.

The Secretary, however, contends that the use of the term "regular rate" in § 7 (e) was meant to incorporate the pre-1949 judicial interpretation of that term, and that these pre-1949 cases establish that specified hourly rates are not "regular rates" unless they have actually received significant or substantial use in determining amounts to be paid to employees. Since the specified hourly rates are only operative when the employees work hours in excess of those guaranteed

[3] "SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employees necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

in the contract, this is an assertion that a guaranteed wage plan can only be valid if the employees who are subject to the contract work a number of hours in excess of the guarantee period in a "substantial proportion" or "significant number" of workweeks. For the reasons stated below, we think the Secretary's contention that Congress intended to impose a "significant number of workweeks" test on guaranteed wage plans, which in all other respects comply with § 7 (e), is an incorrect interpretation of the Act.

First, the pre-1949 decisions indicate that the law as to guaranteed wage contracts under § 7 (e) was unclear and unsettled. The two Supreme Court cases upholding the validity of guaranteed wage contracts, *Walling* v. *Belo Corporation, supra,* and *Walling* v. *Halliburton Co., supra,* give no indication that the Supreme Court had adopted the "significant number of workweeks" tests as a criterion of validity. In *Belo* the Court adverted to the fact that the employees, on occasion, exceeded the guarantee period and that in such weeks they received more than the guaranteed wage, but no weight was accorded that fact, and no attention was paid to the number of workweeks in which the guarantee was exceeded. In *Halliburton* the Court noted that the guarantee was exceeded "in about 20 per cent of the workweeks," but there is nothing to warrant a conclusion that the Court had established the requirement that there be a relationship between the number of hours for which pay is guaranteed and the number of hours customarily worked.

The decisions of lower federal courts illustrate the unsettled state of the law. Two Courts of Appeals adopted the "significant number of workweeks" test advocated by the Department of Labor. *McComb* v. *Sterling Ice & Cold Storage Co.,* 10 Cir. 1947, 165 F.

2d 265, *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726; a third Court of Appeals upheld a guaranteed wage plan even though the employees involved never exceeded the hours guaranteed, *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; and this Court upheld the validity of a guaranteed wage plan without reference to the number of workweeks in which the hours worked had exceeded the guarantee, *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

Second, the purpose and history of the enactment of § 7 (e) in 1949 indicates congressional unwillingness to adopt the test advocated by the Secretary. When the Fair Labor Standards Act was originally enacted in 1938, the nation was in a period "of widespread unemployment and small profit." *Overnight Motor Transp. Co.* v. *Missel,* 1942, 316 U. S. 572, 578. The major purposes of the Act were to eliminate long hours and to spread work by increasing the cost of overtime to employers. With the improvement of the national economy, the Supreme Court upheld the validity of a guaranteed wage contract, indicating that it would not give the Act a rigid application which would make impossible the attainment by employers and employees of other objectives fully as meritorious as the spreading of employment, stating: "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance" and also: "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to em-

ployees with irregular hours." *Walling* v. *Belo Corporation, supra,* at 635. The Department of Labor, strongly opposing this interpretation of the Act, attempted to obtain judicial[4] and then legislative reversal of the *Belo* doctrine. Many employer and employee groups, however, favored *Belo* and advocated legislative approval and expansion. During 1949, when revision of the Fair Labor Standards Act was being considered, these conflicting views were placed before Congress in the form of bills which would have: (1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a "significant number of workweeks" test; or (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed. Congressional adoption of the third alternative in preference to the first or second alternatives which were advocated by the Department of Labor suggests that Congress favored *Belo* contracts and that it did not intend to limit their use in the manner suggested by the Secretary.

Other factors reinforce this conclusion. The inclusion of certain express limitations on the use of guaranteed wage contracts in § 7 (e) indicates that other limitations, not expressly stated, were not intended. And the precise statement in § 7 (f) (3) of a requirement similar to that contended for by the Secretary with respect to § 7 (e) supports a similar inference. Finally, the confusing state of the case law makes it unlikely that Congress intended to incorporate a "significant number of workweeks" requirement by the indirect method of including in § 7 (e) the phrase

[4] In *Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17, 25, the Administrator of the Wage and Hour Division, Department of Labor, contended that *Belo* had been wrongly decided. This contention was rejected by the Supreme Court.

"regular rate." Congress could hardly have found a less precise way to express such an intention.

Third, the judicial interpretation of § 7 (e) is contrary to the position advocated by the Secretary. In *Tobin* v. *Little Rock Packing Co.,* 8 Cir. 1953, 202 F. 2d 234, a guaranteed wage plan was upheld even though the employees *never* exceeded the guaranteed number of hours.[5] And recently the First Circuit has rejected the Secretary's argument in a persuasive and comprehensive opinion by Chief Judge Magruder. *Mitchell* v. *Brandtjen & Kluge, Incorporated,* 1 Cir. 1955, 228 F. 2d 291, aff'g D. Mass. 1955, 129 F. Supp. 675. We entirely agree with the reasoning and conclusion contained therein.

Judgment affirmed.

---

[5] To the same effect is *Mitchell* v. *Adams,* M. D. Ga. 1955, 129 F. Supp. 377. The Secretary relies on the following cases as demonstrating judicial recognition under § 7 (e) of the "significant number of workweeks" test: *Sikes* v. *Williams Lumber Co.,* E. D. La. 1954, 123 F. Supp. 853; *Tobin* v. *Aronow,* D. Mont. 1951, 96 F. Supp. 279; *Tobin* v. *Morristown Poultry Co.,* E. D. Tenn. 1952, 21 CCH Labor Cases, Par. 66, 798; *Tobin* v. *Keystone Mfg. Co.,* W. D. Ark. 1952, 21 CCH Labor Cases, Par. 66, 911; *Tobin* v. *Wenatchee Air Service, Inc.,* E. D. Wash. 1952, 21 CCH Labor Cases, Par. 67,019; *Tobin* v. *Ewbank Motor Freight Lines, Inc.,* W. D. Tenn. 1952, 23 CCH Labor Cases, Par. 67,411. We think these cases are either erroneous or distinguishable on their facts.

United States Court of Appeals for the Second Circuit

No. 88—October Term, 1955

(Argued January 18, 1956. Decided July 31, 1956)

Docket No. 23464

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE

v.

MEYER FEINBERG, DEFENDANT-APPELLANT

Before: MEDINA, HINCKS, and WATERMAN, *Circuit Judges.*

Appeal by defendant, Meyer Feinberg, from a judgment of the United States District Court for the Eastern District of New York, Galston, J., enjoining him from violating the overtime and record-keeping provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* Decision below reported at 123 F. Supp. 899. Judgment modified.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., John A. Hughes, Regional Attorney, *for plaintiff-appellee.*

Benjamin Cooper, New York City, *for defendant-appellant.*

PER CURIAM:

We think our decision in *Mitchell* v. *The Hartford Steam Boiler Inspection and Insurance Company,* filed July 20, 1956, requires a modification of the judgment

below. The facts are stated in Judge Gaiston's opinion below, 123 F. Supp. 899.

It is true that under the Feinberg contract, an employee may receive greater compensation, in terms of hourly rates, for weeks in which he works four days (or less) than in weeks in which he works five days. This incident, however, is not violative of the Act and constitutes, in our judgment, insufficient ground to differentiate the case from *Hartford*. We hold that there was error in the conclusions that the contract did not meet the requirements of the Fair Labor Standards Act, 29 U. S. C. A. § 201, and that the defendant had failed to pay required overtime for work in excess of 40 hours.

The violation of the record-keeping provisions of the Act, 29 U. S. C. A. §§ 211 (c) and 215 (a) (5), we think was fully proved and properly enjoined.

Modified.

WATERMAN, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the per curiam opinion filed by my colleagues insofar as they affirm the decision below that the record-keeping provisions were violated. I dissent therefrom insofar as they hold that there was no violation of the overtime provisions, for I believe this case is so different on its facts from *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.* that the facts here require affirmance of the decision below. Although many of the contentions of the Secretary of Labor are disposed of adversely to him by our *Hartford* decision, it is my thought that the provision in appellant Feinberg's collective bargaining agreement by which appellant pays overtime compensation for non-overtime work clearly demonstrates that there was no compliance—and no intent to comply—with the requirement that a "regular rate" of pay be paid

for a workweek of forty hours or less; and therefore the agreement if entered into by an employer subject to the Act is violative of the Act,[1] and performance of it by the appellant, so subject, causes him to violate. See *149 Madison Ave. Corp. et al.* v. *Asselta et al.* (1947), 331 U. S. 199.

I read § 7 (e) of the Act, 29 U. S. C. (1952 ed.) § 207 (e) which became law in 1949 subsequent to Asselta, and which was discussed by us in *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra,* to state that employers who employ employees who work irregular hours during a workweek *in excess* of forty hours may provide a weekly guaranty of pay within the limitations therein contained provided the guaranty agreement specifies "a regular rate of pay" and "compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek."[2]

[1] Feinberg stipulated that his employees were within the coverage of the Fair Labor Standards Act. No question has been raised concerning the possible application to this case of the exception contained in § 13 (b) (1) of the Act, 29 U. S. C. § 213 (b) (1), which provides that "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act," 49 U. S. C. § 304, shall not be subject to the overtime provisions of the Fair Labor Standards Act. See *Morris* v. *McComb*, 1947, 332 U. S. 422.

[2] The pertinent statutory provisions are 7 (a) and 7 (e) of the Fair Labor Standards Act as amended. They read as follows:

"SEC. 7 (a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

"SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a work-

I believe the facts in this case do not permit Feinberg to find shelter under § 7 (e).

Feinberg is the owner and operator of a small trucking business, and all of his employees, approximately 20 in number, are drivers or helpers who pick up and deliver cut goods and completed garments among manufacturers and contractors in the garment industry. These employees are paid pursuant to a guaranteed wage plan embodied in a collective bargaining agreement entered into by a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of which the employees are members, and an employers' association, of which Feinberg is a member. This collective bargaining agreement specifies a regular basic hourly rate for the first 40 hours in each week, and guarantees payment each week, subject to conditions described below, for at least 8 hours of overtime at a rate equal to one and one-half times the regular hourly rate.[3] The guaranty is expressly qualified by the following provision:

---

week in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

[3] For instance, the schedule of wages provides:

Chauffeurs' guaranteed wage 48-hour week	*Chauffeurs' guaranteed wage and hourly rate— 48-hour week*
$91.00	$1.75
92.00	1.77
93.00	1.79

> No wages shall accrue or be paid to an employee during those weeks in which he is not required to report for work, and wages as provided for in the attached schedule, shall be reduced in proportion to days absent during those weeks where the employee fails to report for any reason other than lack of work, provided that said employee had, in fact, commenced work during that week, or had been called upon to render services during any day of the workweek, which workweek shall commence on Monday.

The agreement also provides that

> Temporary or part-time workers shall not be covered under this subdivision; the practice and the provisions in force shall continue.

The district court below found that prior to August 1953, Feinberg's employees worked variable hours from week to week, but never as many as 48. Up to that time the employees kept their own time cards, recording the actual hours worked. Then, beginning in August 1953, Feinberg personally kept the time cards, uniformly recording 48 hours for each employee each week, irrespective of the actual hours worked. The court concluded that Feinberg's employees never worked in excess of 48 hours a week and that his records did not accurately indicate the actual hours worked subsequent to August, 1953.

The district court, in holding that this wage agreement did not qualify under § 7 (e), 29 U. S. C. § 207 (e), for exception from the basic overtime provision of the Act, § 7 (a), 29 U. S. C. § 207 (a), relied on the following facts: (1) the hours worked by the employees never exceeded the 48 hour guaranty period; (2) employees who testified did not understand the method by which they were paid; (3) Feinberg's records did not accurately reflect the number of hours

his employees actually worked; and (4) where an employee missed a day for personal reasons, his pay for the week was decreased by one-fifth of the guaranteed wages for a forty-eight hour week. Insofar as the trial judge may have adopted the so-called "significant number of workweeks" test advocated by the Secretary to reach his result, he applied an erroneous criterion. *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra.* See also *Mitchell* v. *Brandtjen & Kluge, Inc.,* 1 Cir. 1955, 228 F. 2d 291. However, the opinion of the district judge, 123 F. Supp. 899, indicates that he was not relying on such a narrow proposition, but on the belief that the cumulative impact of all of the above factors demonstrated that the contractually specified hourly rates were wholly fictitious, had no significance in actuality, and were therefore not "regular rates" within the meaning of § 7 (a) and (e).[4]

I think that most of the factors relied on by the district judge are of minor significance. The validity of a guaranteed wage plan does not depend upon the fact that the employees have or have not worked hours in excess of those guaranteed in the contract or agreement, *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra.* Similarly, the inadequacy of the records may well constitute a violation of the record-keeping provisions of the Act, 29 U. S. C. §§ 211

[4] A footnote in *Mitchell* v. *Brandtjen & Kluge, Inc.*, 1 Cir. 1955, 228 F. 2d 291, 296, note 1, suggests the same position: "The argument would be that when § 7 (e) requires that a bona fide contract of employment must specify, among other things, 'a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a),' it is not enough that the contract of employment may name an hourly rate and label it the 'regular rate of pay,' where it is obvious that such hourly rate is merely an arbitrary and fictitious figure not really meant by the parties to be the basis upon which the agreed compensation is to be calculated."

(c) and 215 (a) (5), but that alone should not invalidate a proper guaranteed wage plan when other evidence clearly shows that the employees' duties necessitate irregular hours and that the employees have never exceeded the hours for which the employer has guaranteed to pay. Also the fact that several employees failed to completely understand the computation by which they are paid does not make the established practice "unreal" or "fictitious." If the employees were working under individual contracts, their failure to fully understand the terms of employment might raise serious doubts concerning the bona fides of the contract, but they were working here under a collective bargaining agreement negotiated with the International Brotherhood of Teamsters, Chauffeurs, and Helpers, one of the most powerful unions in the country. Despite this, I think that this particular collective bargaining agreement violates the provisions of the Act by requiring that the employer reduce the weekly guaranteed wage "in proportion to days absent during those weeks where the employee fails to report for any reason other than lack of work * * *." Under this provision of the collective bargaining agreement, Feinberg decreased the pay of employees who missed days of work for personal reasons by one-fifth of the "guaranteed" weekly wage for each day missed. So in such workweeks, the employer was neither paying the guaranteed wage provided for in the agreement nor determining compensation for work hours not in excess of 40 hours by the application of the hourly "regular rate" specified in the agreement. He was crediting employees with daily overtime in such workweeks. I contend that the Act requires the employer, if he is subject to its provisions, to pay the guaranteed sum in compliance with § 7 (e), or, if, for a justifiable reason, he does

not do so, to pay his employees in accordance with the "regular rate" specified in the agreement as required by § 7 (a) and reiterated in § 7 (e). I reach this conclusion reluctantly because of the obvious benefits to employees of such a practice as the daily crediting of overtime. But the judicial interpretation of the Act prior to the 1949 amendment clearly proscribed such arrangements, *149 Madison Ave. Corp.* v. *Asselta*, 1947, 331 U. S. 199, 204–206, and I am unable to find any congressional determination to overrule such interpretation by the enactment of § 7 (e). True, a guaranteed wage contract escapes the actual application of the specified "regular rate" by applying that rate and the overtime rate to an assumed, rather than actual, number of weekly work hours. But the overtime rate is still applied whenever the hours actually worked exceed the guaranteed hours. *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 21. Conversely, when the hours of work are less than forty, *and*, because of the provisions of the particular contract or agreement, the employer is not obligated to pay and does not pay the full guaranty, I think he is required to determine the pay of his employees by application to the actual hours worked of the "regular rate" specified in the contract or agreement.

Therefore I think the district court properly enjoined Feinberg from violating both the overtime and the record-keeping provisions of the Act, and I would affirm the judgment below in all respects.

APPENDIX B

STATUTORY PROVISIONS

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201):

SEC. 7* [63 Stat. 913].

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

*(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

*(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two

* Single asterisk (*) indicates amended provisions; double asterisk (**) indicates new provisions (as amended in 1949).

consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of forty hours in the workweek or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Secretary of Labor to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

**(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

**(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency;

**(2) payments made for occasional periods when no work is performed due to vacation,

holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

**(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan, for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

*(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth and seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

*(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

**(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if, pursuant to an agreement or under-

standing arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of forty hours—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (d) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

*(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

U. S. GOVERNMENT PRINTING OFFICE: 1988